

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ALABAMA
4 SOUTHERN DIVISION
5

6 UNITED STATES OF AMERICA, *
7 Plaintiff, *
8 v. * Case No. CR-15-MHH-0154-S
9 KIMBERLY H. BRANCH, * Birmingham, Alabama
10 Defendant. * August 13, 2015
11 ***** 9:15 a.m.

12 TRANSCRIPT OF TRIAL BY JURY, VOLUME IV OF V
13 BEFORE THE HONORABLE MADELINE HUGHES HAIKALA
14 UNITED STATES DISTRICT JUDGE
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22

23 Court Reporter: Chanetta L. Sinkfield, CCR, RMR
24 United States Federal Courthouse
25 1729 Fifth Avenue North
Birmingham, AL 35203

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I N D E X

August 13, 2015; VOLUME IV

*Direct Cross Redirect Recross Further Redirect*DEFENSE
WITNESS

KIMBERLY BRANCH 699 724 734

CLOSING ARGUMENTS P. 755

JURY QUESTION P. 806

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P R O C E E D I N G S

(9:30 a.m.)

(Outside the presence of the jury.)

THE COURT: Tammi is bringing you the draft instructions on the law that I e-mailed last night. I have made a few revisions, but they are minor. They're stylistic.

(Jury in at 9:32 a.m.)

THE COURT: Y'all ready to get started this morning?

ALL JURORS: Yes, ma'am.

THE COURT: All right. We were in the middle of some cross examination yesterday.

Ms. Branch, as you are walking toward the stand, I will remind you that you are still under oath.

THE WITNESS: Yes, Your Honor.

MS. WICK: Thank you, Your Honor.

CONT'D CROSS EXAMINATION

BY MS. WICK:

Q Ms. Branch, yesterday, I kind of jumped around all over the place, and I am sorry for that. I am trying to go in topic order. And I am not trying to trick you. But if don't understand my question, please don't hesitate to ask me to rephrase it.

Yesterday, you were talking about the accounting process and you were explaining the booking, and it was very

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1 helpful in terms of clarifying. And I just wanted to make
2 sure we had covered the tiers -- not the tiers, but the I want
3 to say again, and you can correct me if I am wrong -- Cullman,
4 the first step was booking?

5 A No.

6 Q I knew I was going to get this wrong -- accepted?

7 A Yes.

8 Q So the F & I guy accepted in Cullman, and the final stage
9 in Cullman was called capped?

10 A Correct.

11 Q In Reynolds and Reynolds in Birmingham, the first stage
12 was the F & I manager would put it in as pending?

13 A Usually the sales manager.

14 Q The sales manager. And the -- I think you said the sales
15 manager or an F & I person could book the deal, but that was
16 not final in Birmingham?

17 A Correct.

18 Q Okay. They just sent it to accounting to notify them
19 that it was ready to be finalized, and that was called
20 finalizing in Birmingham in the accounting system?

21 A Correct. They didn't really send it to accounting, but
22 accounting could not finalize the deal unless it was booked.
23 So when they booked the deal, they would turn the deal into
24 accounting, and then accounting would be able to pull that
25 deal up and book it. But if it was still in pending,

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1 accounting would send it back, and say, okay, this deal is not
2 booked, so we cannot finalize it.

3 Q Okay. I totally understand that. Okay. So, for these
4 15 deals that we have been talking about, the ones that were
5 shifted from -- that were actually sold in Cullman but were
6 reported sold in Birmingham, those deals were capped in
7 Cullman you said?

8 A Yes.

9 Q Okay. They could have been booked in pending status and
10 then booked by a finance manager in Birmingham without ever
11 having been finalized in Birmingham, right; because they were
12 two separate systems, weren't they?

13 A Yes.

14 Q Okay. Can you only finalize one car once?

15 A On one DMS, yes.

16 Q Okay. Let me talk with you briefly about the audit that
17 we have been talking about. Government's Exhibit 25, that
18 everybody was looking at, that audit report from 2013, that
19 closing meeting was held on March 15th, 2013. That was before
20 these 15 deals, wasn't it?

21 A Yes.

22 Q So these 15 deals that we've been talking about, they
23 weren't part of the scope of that audit that Mr. Creecy was
24 talking about?

25 A No, ma'am.

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1 Q Okay. Do you know -- were these 15 deals ever part of a
2 Nissan audit?

3 A No, ma'am.

4 Q For that audit, the one that we were talking about, prior
5 to these 15 deals -- the one that Mr. Creecy testified -- and
6 I think you said, I would have been the one to send the
7 accounting data, I would have been the one to pull the deal
8 jackets, do you know if there were any fake deal jackets
9 created for that audit?

10 A I do not know.

11 Q Did any of those deals that you pulled for that audit
12 have two sets of deal jackets?

13 A I didn't pull the deal jackets.

14 Q The ones that you made sure were pulled for Mr. Creecy?

15 A Not that I remember, no.

16 Q You didn't check to make sure there's not a duplicate,
17 there's not a double of these deal jackets before we pull them
18 for Nissan?

19 A No, I didn't.

20 Q You knew having those deal jackets was important to the
21 audit, right?

22 A Yes, that was part of the scope of the audit, yes.

23 Q And you knew that the purpose of that process, having
24 those deal jackets for when the auditor came, was to make sure
25 that you were doing things properly, right?

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1 A Yes. I believe so.

2 Q Yesterday you mentioned some internal auditors that came
3 on that would check what you did. I think you said that was
4 like a bookkeeping audit for tax returns. Did they audit for
5 Nissan -- well, did I mischaracterize what you said; is that
6 not right?

7 A We have internal auditors, yes, that come in once a year.

8 Q And I thought I understood you to say the purpose of that
9 was they check your bookkeeping to make sure that the debits
10 and credits and the books are balanced?

11 A They basically just review the books.

12 Q But they don't audit for Nissan incentives, do they?

13 A I don't know if they -- I mean, I am sure they look at
14 all the schedules.

15 Q Do you know if they are familiar with the audit world,
16 check the deal jackets? Do they go through what the Nissan
17 auditors do when they come on site to do the Nissan incentive
18 audit?

19 A They do pull deal jackets and request paperwork out of
20 the deals, so -- inside their audit.

21 Q Would they be able to know if you gave them a fake
22 Birmingham deal jacket, that that car was sold in Cullman?

23 A I don't know why they would -- no.

24 Q They wouldn't be able to tell, right, because you would
25 hand them a Birmingham deal jacket, and it says the car was

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1 sold in Birmingham, how would they know if the car was sold in
2 Cullman, if they didn't call every customer and say did you
3 buy this car?

4 MR. BROOME: Judge, these are multiple questions.
5 If she would ask one question and let her answer the question.

6 THE COURT: Good point.

7 BY MS. WICK:

8 Q If you handed the auditors a Birmingham deal jacket, how
9 would they know that car wasn't sold in Birmingham?

10 A I don't know.

11 Q Could they?

12 A I don't know. I guess they could if they -- I have no
13 idea why they would request certain deal jackets at certain
14 points. But yeah, I guess they wouldn't be able to tell. I
15 don't know.

16 Q They would or would not?

17 A I would think they would not.

18 Q Okay. Do you remember -- was it part of your job as the
19 controller to calculate the net profit for the dealership?

20 A Yes.

21 Q Do you know what the net profit for the dealership was in
22 2013?

23 A No, ma'am.

24 Q Can you ballpark it?

25 A No, ma'am. I believe Randy stated something, one million

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1 something, but I don't know if he is accurate or not.

2 Q Do you know what the net profit was for 2014?

3 A No, ma'am, I don't.

4 Q Is it part of your job to calculate that for a tax return
5 and other paperwork?

6 A I don't do the tax returns for the stores, so no. I
7 mean, I'd calculate it on a monthly basis, but typically I
8 don't keep track of it on a yearly basis without -- if I
9 wanted to know, I could pull the financial statement, but
10 that's not something that stands out in my mind.

11 Q I think you said -- and I don't want to get the number
12 wrong -- but I think you said it was something a little over a
13 million?

14 A I think that's what he said, yes.

15 Q And that was for the Serra Nissan -- that was just Serra
16 Nissan and Serra VW, right?

17 A If I remember correctly, yeah, that's what he said.

18 Q That was, I think, at least 20 or -- two percent of the
19 net of that was at least 20 or \$30,000. So your base salary
20 for 2013, not including the net that you got for Serra Visser
21 Nissan, was at least 120 or \$130,000, wasn't it?

22 A If the one point is right, yes.

23 Q Let's not even use those numbers. What did you make in
24 salary from Serra Nissan and Serra Visser Nissan in 2013?

25 A Around \$150,000.

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1 Q Do you remember what you made in 2014?

2 A I believe it was about the same.

3 Q So at your old dealership, that was a \$50,000 increase
4 -- you said you made \$100,000 when you left. So that was 50
5 percent pay raise when you went to Serra Nissan, roughly?

6 A Yes. Roughly.

7 Q Earlier you have said you weren't familiar with the sales
8 side. Are you familiar with the recap sheet, with what that
9 is?

10 A Yes.

11 Q Stipulations? Stips?

12 A No.

13 Q You don't know what stips are?

14 A Stipulations? No, I don't know what stipulations are or
15 would be in deal.

16 Q Do you remember testifying in a hearing after the
17 government did a search warrant in October of 2013?

18 A Yes, I do.

19 Q Okay. Do you remember being asked under oath what stips
20 are?

21 A I understood you to say stipulations.

22 Q I said stips, and then I said stipulations.

23 A Oh, I am sorry.

24 Q Okay. So now you know what a stip is?

25 A No, no, I understood you to say stipulations.

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1 Q Okay. So do you know what stips or stipulations are?

2 A Yes, I do know what stips are.

3 MR. BROOME: Your Honor, I think we're talking about
4 two different things. We have entered into stipulations here
5 today, and I am sure that's not the same thing as stips are in
6 a car dealer situation.

7 MS. WICK: Your Honor, I was asking about the sales
8 process, the recap sheet. I said stips or stipulations. If
9 the witness is now saying she understands what stips or
10 stipulations is, that's fine.

11 MR. BROOME: We're still talking about two different
12 things.

13 THE COURT: All right. Ms. Wick, why don't you ask
14 your question again and make clear the foundation for the line
15 of questions.

16 MS. WICK: Sure.

17 BY MS. WICK:

18 Q Earlier, you said that you weren't familiar with a lot of
19 the sales process side. I asked you if you were familiar with
20 the recap sheet, which is something they use on the sales
21 side. You said, yes. I asked if you were familiar with stips
22 or stipulations, talking about the sales process at the
23 dealership, and I thought you were saying, no, you weren't
24 familiar with stips or stipulations of the sales process at
25 the dealership.

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1 I'm not talking about when we say stipulations to
2 facts here in court, but the stips or stipulations that is
3 used in the sales process at the dealership. Do you
4 understand what those are?

5 A I understand what stips are, but I have never heard them
6 called stipulations. So, that was my confusion.

7 Q Okay. You didn't know that stips was short for
8 stipulations?

9 A I had never heard that used in the terminology at the
10 dealership. I just heard stips.

11 Q Okay. And that's fair. I don't want there to be any
12 confusion about what the question was.

13 Are you familiar with what a "we owe" sheet is?

14 A Yes.

15 Q You still work at the Serra Nissan dealership as the
16 controller, right?

17 A Yes, ma'am.

18 Q And you have a pretty good relationship with the Vissers?

19 A I don't really talk to them very often, but I wouldn't
20 say we have a bad relationship.

21 Q Well, isn't the dealership paying for your legal fees in
22 this case?

23 MR. BROOME: Judge, I would object to that question.

24 MS. WICK: Your Honor, that goes directly to her
25 motivation for her answers and why she is here.

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1 MR. BROOME: Judge, I would object to that
2 characterization, also.

3 THE COURT: Sustained.

4 BY MS. WICK:

5 Q Ms. Branch, yesterday you talked about a woman named
6 Yolanda -- and I want to make sure -- she is the coster for
7 Cullman, but she is located in the Birmingham store?

8 A Yes, ma'am.

9 Q Okay. Is she who would have capped the deals in Cullman
10 system in Birmingham?

11 A She would have capped them in the Cullman DMS. And yes,
12 she is located at the Birmingham office.

13 Q So she has the ability out of the -- and I think you said
14 that you guys are located actually in the VW side, so in the
15 city of Birmingham -- but she has ability to go into
16 Cullman's, you said Dealertrack system and cap the Cullman
17 deals?

18 A Yes.

19 Q Okay. Can you explain exactly what her responsibilities
20 are as a coster?

21 A She would pull out the contract and send it to the bank,
22 post the deal into accounting, do any payoffs, write any
23 referral fees, pull up the warranties, and basically just go
24 through the whole deal.

25 Q When you say pull out the warranties, would she have had

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1 to send those to -- and maybe we're talking -- I want to make
2 sure I am not talking about the wrong thing.

3 Are you talking about the warranty that starts with
4 the car, or the extended warranty, the SEC+, that we talked
5 about?

6 A SEC+.

7 Q So she would have to pull those out and send them to
8 somebody?

9 A We usually had them sent over to someone else to make
10 sure they got submitted. If they were new cars, they were
11 submitted -- they were submitted when the vehicles RDR'd. But
12 if they were used cars, they would still have to be actually
13 manually entered into the system for Security+Plus.

14 Q Was she responsible for dealing with bills of sale and
15 title applications?

16 A The bill of sale being the deal and title app, she would
17 give to the title clerk.

18 Q So who would be responsible for actually pulling out a
19 bill of sale and title application from the deals to do
20 whatever was next to those documents?

21 A She would give that to the title clerk.

22 Q So it would be the coster?

23 A She would pull them out, yes.

24 Q So she would pull them out and literally hand them to the
25 title clerk to use those to what -- to send them to the state

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1 for a title or something?

2 A The title app -- I believe, or the title.

3 Q If she pulled out a Birmingham, Center Point bill of sale
4 title application out of a Cullman deal jacket, would she come
5 talk to you about that?

6 A I don't know. I don't know if she would notice. I don't
7 know.

8 Q It wasn't part of her job to notice if the bill of sale
9 or the title applications that Birmingham with the deal jacket
10 was that bright turquoise color?

11 A I don't know that she would notice the difference in the
12 documents.

13 Q So, nobody ever came to you or said anything to you in
14 the accounting office about 15 deals having bills of sale and
15 title applications that were Birmingham in Cullman deal
16 jackets?

17 A No, they did not.

18 Q Wouldn't they have had to access those deals pretty
19 regularly? I mean, wouldn't they be constantly in there
20 looking through the paperwork?

21 A Not typically after the deal is done, no. Once the
22 billing clerk caps the deal, it gets filed.

23 Q And then what happens to it?

24 A It gets filed on the shelf.

25 Q Does it just sit there untouched for years?

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1 A Unless for some reason we need something out of it. But
2 typically, yes, it would just stay in the filing cabinet.

3 Q I want to go back when we were talking about your
4 testimony in those previous hearings. Do you remember being
5 asked how often in the daily operation of your business those
6 deal files are accessed on a regular basis for information?
7 Do you remember being asked that under oath?

8 A I do.

9 Q Do you remember saying that those deals were accessed
10 daily, regularly, constantly?

11 A I was referring to all the deals. So, on a daily basis,
12 at one point we're going to need one deal, two deals on a
13 daily basis. I wasn't referring to every single deal. If I
14 remember the question correctly.

15 Q Would you like me to refresh your recollection with your
16 testimony?

17 A Sure.

18 Q You were asked: To be clear, were dealer files taken
19 during the raid on Thursday night?

20 A You said: Yes, ma'am.

21 Q You were asked: Tell the Court how you know that to be a
22 fact. In the accountant office, we keep two years worth of
23 deals because we access them so regularly. You were asked:
24 In the daily operation of these businesses, are those deal
25 files accessed on a regular basis for information? Yes,

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1 ma'am.

2 A I was referring to if 300 deals are missing from the
3 filing cabinet, customers are wanting to call about certain
4 things that they need out of those deals, not one particular
5 deal of 300 or 200 deals that -- I don't know how many there
6 were. But at one point on a daily basis, someone is going to
7 call and want something out of one of those deals.

8 Q Did anybody need anything out of these 15 deals, or these
9 were the 15 that sat untouched for two years?

10 A I don't know if they needed anything out of them or not.
11 If they would have been, they would have been on the shelf.

12 Q I want to talk with you briefly about your attestation.
13 If we could pull up Government's Exhibit 23.

14 Yesterday we were talking about the subpoena that was
15 issued to the dealership, to Serra Nissan for the 15 deals.
16 In fact, I think you said they were issued to the Birmingham
17 dealership. And you understood that they were looking for
18 Birmingham deal jackets, and you couldn't find Birmingham deal
19 jackets. I think you also said you didn't review this
20 document; is that right?

21 A No, I did not read it completely. Not that I remember.

22 Q Can we call out the top part from certification and
23 acknowledgment down to the first set of signatures?

24 Ms. Branch, do you see where it says, "I declare under
25 penalty of perjury the foregoing is true and correct"?

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1 A I do see that.

2 Q Okay. Did you read that before you signed this?

3 A I don't remember.

4 Q Did you understand that signing this and having it
5 notarized was the equivalent of an affidavit under oath?

6 A I was just asked to sign it by an attorney that -- I
7 just -- no, I did not read it in its entirety and realize
8 exactly -- he told me that I needed something about a
9 custodian or something like that. And so I printed out and
10 signed it and had my title clerk notarize it.

11 Q Did you review the content for accuracy at all?

12 A Not that I remember.

13 Q So did you contribute or tell the attorney anything to
14 put into this?

15 A No, ma'am.

16 Q Okay. So you had absolutely nothing to do with the
17 drafting of this content?

18 A Not that I recall. I remember I think it was e-mailed to
19 me by the attorney to sign.

20 Q Okay. Yesterday when we were talking about when you
21 realized that the 15 deals requested in the subpoena were the
22 15 shifted car sales, you said it was some time prior to -- I
23 think you said something about the warranties, like when you
24 had to pay the warranty check, right?

25 A Can you repeat that?

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1 Q I don't want to butcher what you said. So, it would be
2 helpful if you could just tell me.

3 When you realized when the 15 deals that were asked
4 for in the subpoena to Serra Nissan, when did you realize that
5 those 15 deals were the 15 shifted sales?

6 A I believe that was when we realized that they were
7 Cullman deals was the first -- of course, signed, and then
8 when I started to look up each stock number and saw that they
9 were all Cullman, and then I also, I had a list of those
10 deals. So I looked at that list and realized that they were
11 the same deals.

12 Q Okay. And it's coming back to me now. I think you said
13 it was right before you produced the documents to Mr. Baty to
14 give to the government, right?

15 A I don't know how long it took for them to actually get
16 them copied and all of that.

17 Q Okay. Can we agree that it was before you signed this on
18 August 1st, 2014?

19 A Yes.

20 Q Okay. So when you signed this under penalty of perjury,
21 you were aware that this subpoena asked for the Serra Nissan
22 deal jackets for these 15 shifted deals that you knew Jeff had
23 created?

24 A No --

25 MR. BROOME: Your Honor, I am going to object to

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1 form of that question. The subpoena has been admitted. The
2 subpoena speaks for itself.

3 MS. WICK: I can break that question down, if it
4 needs to be simpler, Your Honor.

5 THE COURT: Why don't you try breaking it down.
6 BY MS. WICK:

7 Q Ms. Branch, let me back up a minute. Okay? Because I
8 don't want it to be confusing.

9 You said you knew that this subpoena asked for the 15
10 deals that had been shifted, the Birmingham deal jackets,
11 prior to signing this on August 1st, 2014, right?

12 A No, I knew that it was asking for the 15 deals, and the
13 only 15 deals that we had were the 15 Cullman deals.

14 Q Your e-mail to Mr. Visser in June made it clear that you
15 knew Jeff had created 15 Birmingham deal jackets for these
16 deals, right?

17 MR. BROOME: Judge, again, I object to the form of
18 that question.

19 THE COURT: I am sorry. What did you object to?

20 MR. BROOME: She said, "you knew" -- if she could
21 just repeat the question.

22 THE COURT: Okay.

23 MS. WICK: Chanetta, can you read the question back
24 please?

25 (The last question was read.)

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1 A No, I did not know that they were created. My e-mail to
2 him stated that Birmingham jackets had been created by Jeff;
3 that at that point, I was using the conversation that I had
4 with Forest Housner that Jeff was to create Birmingham
5 jackets; that I was not positive at that point --

6 Q Okay.

7 A -- that they actually were.

8 Q And I am sorry.

9 A -- I was trying to reassure him, I guess.

10 Q Okay. Sorry, I couldn't find -- is it possible for us to
11 call up 24 with this? Is that possible? Together? I don't
12 know if that's possible. Let's just do 24. Sorry. And the
13 second page. And the middle e-mail.

14 Ms. Branch, when you e-mailed Mr. Visser on June 3rd,
15 did you say, "I think Jeff also created a Birmingham deal
16 jacket"? Or did you say, "Jeff also created a Birmingham deal
17 jacket for each of these deals so we would have it if they
18 ever request the deal to be pulled"?

19 A No, I did not say, "I think," but I never actually saw
20 these jackets. I just knew that they had supposedly been
21 made.

22 Q Because you made four separate trips to bring him the
23 Cullman deals for him to duplicate them, didn't you?

24 A I gave him the Cullman deals, but I never saw the actual
25 Birmingham deals.

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1 Q So, you sent this e-mail months after making four trips
2 to bring him all those deals, and you were unclear if Jeff
3 made the jacket -- I mean, let me back up. I don't want there
4 to be any confusion.

5 MR. BROOME: She asks her a question, and then she
6 never lets her answer the question.

7 MS. WICK: I want to back up because I know defense
8 counsel wants us to be perfectly clear.

9 MR. BROOME: I want everybody to be perfectly clear.

10 THE COURT: Come up to the bench, please.

11 (The following proceedings were held at the bench, out of the
12 hearing of the jury.)

13 THE COURT: Number one, we went through all this
14 testimony yesterday evening. You did the same examination
15 with this same exhibit and asked the questions that you just
16 covered. Okay? So it's kind of beating a dead horse.

17 MS. WICK: Okay.

18 THE COURT: Second, let's get through this
19 questioning. Okay? I don't think there was anything wrong
20 with the last question that Ms. Wick asked that was not a
21 question that was asked yesterday. And so, let's try to do
22 this.

23 MS. WICK: I am sorry, Your Honor. I'm questioning
24 her about the attestation and subpoena unfortunately is kind
25 of doubling back on that. I will try to limit the redundancy,

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1 but -- and I know it's kind of breaking it down, but if every
2 time there's an objection and I have to dumb it down to a
3 level, I apologize for that.

4 THE COURT: Well --

5 MR. BROOME: Just ask her a question and let her
6 answer it.

7 THE COURT: You need to stop the editorial comments.
8 Okay? Just go ahead and ask your question and get an answer,
9 please. Thank you.

10 (Conclusion of bench conference.)

11 BY MS. WICK:

12 Q If we could pull out the top part.

13 Ms. Branch, when this subpoena was issued to Serra
14 Nissan for the Birmingham deal jackets, the subpoena asked for
15 the 15 shifted deals, didn't it?

16 A It asked for the 15 deals, yes, that were shifted from
17 Cullman to Birmingham.

18 Q Okay. You signed this attestation August 1st, 2014,
19 after you had become aware that it asked for the 15 deals that
20 had been shifted, right?

21 A The 15 deals, yes, that were shifted from Cullman to
22 Birmingham.

23 Q Okay. Do you see in the attestation where it refers to,
24 "I hereby certify and acknowledge that the documents, images,
25 and data produced herewith are true and accurate copies of

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1 business records maintained at Serra Nissan, the records on
2 behalf of Serra Visser"?

3 A I do see that.

4 Q Okay. That refers to the Cullman deal jackets that were
5 produced to the government, correct?

6 A Yes, they were Cullman deal jackets.

7 Q Okay. Can we go to page 2 of that exhibit and call out
8 just the e-mail portion. Just the top. No, no, page 2 of 23.
9 I apologize that was my mistake.

10 Mr. Baty's e-mail says, "Subject: June 16, 2014
11 subpoena to Serra Nissan." Right?

12 A Yes, ma'am.

13 Q Okay. He writes, "I did not include a certification from
14 Serra Nissan when I produced the 15 deals most recently
15 requested by the grand jury. Here is Kim Branch's
16 certification for that. If you need the original, she
17 retained it."

18 Where is there reference to those jackets being Serra
19 Visser Nissan Cullman jackets?

20 A I don't see a reference to Serra Visser Nissan.

21 Q So how does the attestation get Cullman into it, but if
22 you didn't tell somebody, these aren't the Birmingham deal
23 jackets, these are the Cullman jackets?

24 A I believe I did tell Randy Visser that the subpoena was
25 asking for Serra Nissan deals because all that we had were the

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1 Serra Visser, the original Serra Visser Cullman deals.

2 Q Okay. Okay. You mentioned that some documents were
3 taken off your desk during the search, and we have established
4 one of those documents was Government's Exhibit 24. Who did
5 you tell at the dealership that the government had taken the
6 list of deals with the e-mails attached off of your desk?

7 A I don't remember noticing if that was off my desk.

8 Q At some point, did you ever notice it?

9 A I believe when I saw the documents that the government
10 provided to us, I realized that it was -- there was a staple
11 in the copies that that was from my desk.

12 Q You never told Forest Housner, they took the list of
13 deals off my desk during the search?

14 A I told -- that I had a list on my desktop, like my
15 computer.

16 Q Did the government take that?

17 A I know that they came in and copied my hard drive on the
18 night of the raid.

19 Q Did you tell somebody at the dealership that they took
20 the list of deals off your computer?

21 A Yes, when I saw the dates -- I think, I referred to it
22 yesterday -- the dates given were not the dates sold. I
23 realized those were somehow from the list, but I did not know
24 it was from the list from my desk.

25 Q So if I am understanding you, your testimony is that when

CROSS - BRANCH

1 you told somebody at the dealership that the government had
2 taken the list of 15 deals after the subpoena in June 2014
3 when you realized that the subpoena attachment referred to
4 your list?

5 A I didn't know they actually took like a physical list. I
6 actually told them that I had saved it on my desktop.

7 Q Okay?

8 A And that it matched up so clearly with my list that I
9 still had saved on my desktop, the same order -- the subpoena
10 was in the same order, the same dates, and everything. So, I
11 did not know that it was from my desk.

12 Q So?

13 A So my desk -- there's actually an icon on my desktop at
14 my computer.

15 Q I am with you. Is it fair to say -- you are saying you
16 did not have conversations with anyone at the dealership about
17 government taking that list of deals either off your desk or
18 your computer until June 2014 when the subpoena came in?

19 A Can you say that one more time? I am sorry.

20 Q I am really not trying to -- if I understood you, you
21 said, I didn't have conversations with anyone about the
22 government taking that list of deals off my computer or off my
23 desk until I realized that the dates that you used in your
24 subpoena were from my list of deals.

25 A I would say that's correct.

CROSS - BRANCH

1 Q Okay. When you had your conversations with Mr.
2 Housner -- okay. Now I am back in March 2013, when you guys
3 decided to shift these deals. Okay.

4 When you had your conversations with Mr. Housner, did
5 you ask him if what you were doing was legal?

6 A No, ma'am.

7 Q Did you ask him if Nissan would have a problem with it?

8 A No, ma'am, I didn't believe he would ask me to do
9 anything that was wrong.

10 Q Did he tell you -- I want to be clear. My understanding
11 was -- you said, he told me to maintain the list, and he told
12 me to take the deal jackets to Jeff. Did he tell you any
13 instructions on what to do in the accounting system for those
14 15 deals?

15 A Are you referring to booking them in accounting, or what
16 are you referring to?

17 Q Any instructions? Did he give you any instructions
18 during that meeting of what you would have to do in accounting
19 for those 15 shifted sales?

20 A He told me about the \$500 and the \$700 that we would be
21 paying Cullman. So that would be an accounting, I guess,
22 function.

23 Q And we went over that yesterday, so I don't want to
24 repeat it.

25 Other than the \$500, \$700, did he say anything about

CROSS/REDIRECT - BRANCH

1 finalizing in Birmingham versus capping in Cullman, anything
2 that would qualify as an instruction on how to handle the
3 accounting for those 15 deals other than the \$500 or \$700?

4 A No, ma'am.

5 Q Okay. You saw the Government's Exhibit 40, which is the
6 fax, and you said to Mr. Broome, I never saw those
7 instructions. You saw them today. Do you remember the big
8 bold print, "This is important..." these deals be booked in
9 Birmingham? Do you remember that?

10 A Yeah, I believe so.

11 Q I know you didn't see it before now, I can call it up if
12 it would be helpful. I am just talking about that all caps
13 language we were talking about?

14 A Yeah, I remember it.

15 Q Okay. He said nothing to you that resembles that portion
16 of the instructions in Government's Exhibit 40?

17 A No, he did not.

18 MS. WICK: Your Honor, no further questions.

19 MR. BROOME: Judge, I have to apologize to the Court
20 and for the jury. I said yesterday, I wouldn't have any more
21 questions, but I do now.

22 THE COURT: All right.

23 MR. BROOME: I am sorry.

24 REDIRECT EXAMINATION

25 BY MR. BROOME:

REDIRECT - BRANCH

1 Q Kim, as far as you know, did those 15 Birmingham deal
2 jackets for the 15 switched deals ever exist?

3 A No, I never saw those jackets.

4 Q Did you trust Forest Housner?

5 A Yes, sir.

6 Q Was the Forest house we saw in here Tuesday the same man
7 that you knew before?

8 A No, sir.

9 Q What was different?

10 A I could tell that he lost a lot of weight.

11 Q What's a lot of weight to you? I lost a pound or two,
12 but you can't tell it.

13 A Probably about 20 pounds. The way he spoke was
14 different. I could tell that he wasn't processing things. He
15 was a very intelligent man, very knowledgeable. And I could
16 just tell that whatever was going on with him medically was --
17 it had affected him in a lot of different ways.

18 Q Forgetting a business relationship with Forest Housner,
19 you liked the man, didn't you?

20 A I did. I did.

21 Q You still do, don't you?

22 A Yes, sir.

23 Q Did you think Forest would ever tell you to do something
24 wrong?

25 A No, sir.

REDIRECT - BRANCH

1 Q Had you seen the shifting and parts, maintenance
2 equipment, and accessories done before?

3 A I had heard about it, yes.

4 Q Before March of 2013?

5 A Yes, sir.

6 Q And how did you know it was done?

7 A In the accounting office, the checks were written back
8 and forth between the two stores in regards to parts and other
9 things.

10 Q You heard about it being done to win trips or prizes or
11 contests, didn't you?

12 A Right. For Cullman, yes.

13 Q Would Cullman typically buy from Birmingham or Birmingham
14 from Cullman?

15 A Both would have them. I believe in the instance that I
16 heard about it was Birmingham bought from Cullman.

17 Q So the big store would buy from the little store, why
18 would that happen?

19 A I believe they did it to attain that contest for Cullman,
20 and so that Cullman could win the contest.

21 Q Okay. There has been a lot of talk about money and what
22 you make. You are not ashamed of what you make, are you?

23 A No, sir.

24 Q You earned it, didn't you?

25 A Yes, sir.

REDIRECT - BRANCH

1 Q You didn't earn it by fraudulently trying to take money
2 from Nissan, did you?

3 A No, sir.

4 Q Let's do a little elementary math. The lady, I think her
5 name was Strickland, had testified she ran all these numbers,
6 and in the end it was \$64,800. Is that her figure, if you
7 remember?

8 A Yes, sir.

9 Q (Writing on board.) When all is said and done, at the
10 end of the year, you got two percent of the net profit?

11 A Each month I received two percent of the net, yes, sir.

12 Q But it was two percent; is that right?

13 A Correct.

14 Q And if Cullman had booked those 15 deals, you would have
15 made money off what Cullman would have got those 15 deals?

16 A Yes, sir.

17 Q Well, we'll forget about that, because that's kind of
18 confusing.

19 Two percent -- would you look at my math -- and I
20 apologize for my writing. Is my math correct?

21 A It appears to be, yes, sir.

22 Q So, I understand if you steal a dollar, that's just like
23 stealing a million dollars, but what we're talking about for
24 you is \$1,296; is that right?

25 A Yes, sir.

REDIRECT - BRANCH

1 Q Out of \$150,000 a year salary?

2 A Yes, sir.

3 Q Was there ever any discussions between you and Mr.
4 Housner and he said Kim, you can make \$1,300 more for doing
5 this?

6 A No, sir.

7 Q And Kim, I apologize for plowing the same ground again.
8 Let's go back, I think it was Government's Exhibit 24. Again,
9 the highlighting is mine. Let me just ask you a few
10 questions.

11 The subpoena was to Serra Nissan, right?

12 A Yes, sir.

13 Q That's the Birmingham store we've been talking about?

14 A Yes, sir.

15 Q All the records for Cullman and Birmingham are kept in
16 Birmingham; is that right?

17 A Yes, sir.

18 Q Serra Nissan is Birmingham. Serra Visser Nissan is
19 Cullman. Is that right?

20 A That's right.

21 Q When you got the subpoena, you and your accounting
22 clerks, or whatever, you guys are looking for Birmingham deal
23 jackets, right?

24 A Yes, sir.

25 Q For those 15 deals?

REDIRECT - BRANCH

1 A Yes, sir.

2 Q Did you ever find them, the Birmingham deal jackets?

3 A No, sir.

4 Q What did you find that matched those serial numbers?

5 A The Cullman deal jackets.

6 Q And that would have been Serra Visser Nissan, right?

7 A Yes, sir.

8 Q And is that not what you said in your attestation?

9 A I am reading it now. It appears to be.

10 Q Well, you said, "these are true and accurate copies of
11 business records maintained at Serra Nissan." That's right,
12 isn't it? That's where you kept the records?

13 A Yes, sir, that's correct.

14 Q Then you say, "on behalf of Serra Visser," the Cullman
15 store, right?

16 A Right.

17 Q And you gave them the only deal jackets that you had that
18 corresponded to those vin numbers?

19 A Yes, sir.

20 Q Thank you.

21 MS. WICK: Two questions, Your Honor.

22 MR. BROOME: I hadn't finished.

23 MS. WICK: Oh, I'm so sorry.

24 MR. BROOME: It's okay.

25 BY MR. BROOME:

REDIRECT - BRANCH

1 Q You were talking a few minutes about a DMS. What is a
2 DMS?

3 A I think it's a dealership -- or dealer management system.

4 Q That's what you were talking about the Dealertrack is in
5 Cullman?

6 A Correct.

7 Q And the Reynolds and Reynolds is in Birmingham?

8 A Yes, sir.

9 Q Now, just to clarify for me, RDR'ing is what?

10 A That's through the Nissan system. It's basically
11 reporting the vehicles sold to Nissan.

12 Q That's completely different from the accounting systems
13 or the DMS's that we're talking about?

14 A Yes, sir.

15 Q But when a car is RDR'd, the warranties, the incentives
16 the customer rebates, all that goes where it was RDR'd, right?

17 A Yes, sir.

18 Q Completely separate from the accounting side?

19 A Right.

20 Q Now, Kim, when Forest asked you to keep a list of
21 details, you did that, right?

22 A I did.

23 Q And I think you told us you added to your list as the
24 sales came in?

25 A Yes, sir.

REDIRECT - BRANCH

1 Q And you took those Cullman deal jackets to Jeff Green?

2 A Yes, sir.

3 Q I believe you told us you never remembered getting those
4 Cullman deal jackets; you never remembered seeing the
5 Birmingham deal jackets for those 15 deals?

6 A No, sir, I don't.

7 Q Now, briefly back to that e-mail between you and Randy
8 Visser. When you got that first e-mail -- it was Government's
9 Exhibit 24. Again the highlighting is mine. And you replied
10 to Mr. Visser. Did you think you had done something wrong?

11 A I understood his e-mail to state that he wanted me to
12 book the deals in Reynolds and Reynolds accounting for
13 Birmingham.

14 Q And you hadn't done that?

15 A No, sir, I had not.

16 Q So when I am talking about wrong, I am talking about
17 wrong as far as Randy Visser's wanted you to do it?

18 A Yes, sir.

19 Q He never personally told you to do that?

20 A No, sir.

21 Q And when you said Jeff created these jackets, why did you
22 tell him that, if you hadn't seen him?

23 A Because Forest had said that he did, and I was just
24 trying to reassure him that they were done.

25 Q When you said you could manually enter the reports, did

REDIRECT - BRANCH

1 you tell him that with the intention to defraud Nissan?

2 A No, sir.

3 Q Why did you tell him that?

4 A Because he wanted them booked in Reynolds and Reynolds,
5 and it was too late to do that. So the only option I had to
6 do what he wanted me to do was to add them to the report.

7 Q Again, did you think there was anything wrong or illegal
8 with doing that?

9 A No, sir.

10 Q Are you just trying to keep your accounting, the
11 incentives matching up with what -- well, you tell me what you
12 were trying to do.

13 A I was just trying to make everything match the books, the
14 reports match -- the RDR compared to the report.

15 Q To defraud somebody?

16 A No, sir.

17 Q And he asked, a response to you, a month or so, six weeks
18 later, and said okay. Right? Basically just do that if we
19 get audited?

20 A Yes, sir.

21 Q Is that the only discussions you had with Mr. Visser
22 about that?

23 A Yes, sir.

24 Q Just to clarify one other thing. In the Birmingham store
25 when we're talking about putting deals into the system, when

REDIRECT - BRANCH

1 the sales managers would put a deal into the system, you call
2 that what?

3 A It would be just --

4 Q In Birmingham?

5 A -- a pending status. The deal would be in pending
6 status.

7 Q Does accounting look at those deals when they're pending?

8 A No, sir.

9 Q And then I think you said the finance and insurance folks
10 or the sales manager would do what?

11 A They would book the deal.

12 Q Would accounting generally or customarily look at those
13 deals when they were booked?

14 A Usually, once the deal was turned in the office, then
15 they would look at those book deals, yes.

16 Q So when they're booked, you would look at them?

17 A Right.

18 Q But not when they're pending?

19 A No, sir.

20 Q When Mr. Shepard testified yesterday he put the deals in
21 the system, or whatever he said, what did that mean? Where
22 were they? Which part of the steps?

23 A It said it would be pending, if he put them there in.

24 Q So accounting wouldn't look at them at that point?

25 A No, sir.

RECROSS - BRANCH

1 Q Kim, did you have an honest belief that what you did was
2 not wrong?

3 A Not wrong, yes, sir.

4 Q Now, after talking to lawyers for six months, or how ever
5 long, you realize now that it's wrong?

6 A Yes, sir.

7 Q If you had known what you know today, back in March, what
8 would you have done?

9 A I wouldn't have done it. I would have -- I just wouldn't
10 have done it.

11 MR. BROOME: Thank you. That's all I have now. I
12 am finished.

13 THE COURT: Ms. Wick, any further questions?

14 MS. WICK: Very briefly, Your Honor.

15 RECROSS EXAMINATION

16 BY MS. WICK:

17 Q You said that you thought this was okay because they had
18 done it in parts, in the parts shifting process?

19 A I had heard of that, yes.

20 Q Did you hear about them having to create false documents
21 for the parts incentive process?

22 A No, I don't remember them discussing that, no.

23 Q Did you ever even hear of a parts audit?

24 A We have parts incentive -- sorry, parts inventory audits.

25 Q Inventory audits, but not parts incentive audits?

RECROSS - BRANCH

1 A No, ma'am.

2 Q So when you realized before August 1st, 2014, that the
3 subpoena requested the shifted deals, did you tell Mr. Baty
4 before signing that attestation that the Birmingham jackets
5 existed?

6 MR. BROOME: Judge, I am going to object. There may
7 be some attorney-client privilege involved here.

8 THE COURT: Okay. And first of all, you need to
9 make sure we keep quiet in the audience. Okay, please.

10 Chanetta, read the question back for me, please.

11 (The last question was read.)

12 THE COURT: All right. I am going to allow the
13 question.

14 A I did not personally speak to Alan Baty about those
15 deals. But I remember either Forest or Randy, one of the two,
16 had told them that the deals that were being requested were
17 Serra Visser Nissan deals, not Serra Nissan deals. I do
18 remember that conversation.

19 BY MS. WICK:

20 Q Who was present for that conversation?

21 A Like I said, I don't remember if it was Randy or Forest,
22 which one I spoke to about that.

23 Q I want to be a hundred percent clear. Your understanding
24 was that Randy or Forest told Mr. Baty that they only had --
25 that you only had Cullman deal jackets for those deals?

RECROSS - BRANCH

1 A That these were actually Cullman deals is what I told
2 him.

3 Q Okay. When Mr. Broome was asking you about the 15
4 Birmingham deal jackets, okay, and you said you never actually
5 saw them after you brought them to Jeff Green?

6 A I brought him the Cullman deal jackets and --

7 Q You are right. That was my mistake. You brought Jeff
8 the Cullman deal jackets -- and I am really not trying to
9 confuse anything.

10 A I understand.

11 Q You brought Jeff the Cullman jackets for him to create
12 the Birmingham deal jackets. And I thought I understood you
13 to say, you never saw the Birmingham deal jackets that Jeff
14 created?

15 A Yes, that is true.

16 Q Wouldn't he have had to bring them back to you for you to
17 have them in the event that Nissan asked for them to be pulled
18 in an audit?

19 A I didn't ask for the deals back, and I don't remember
20 seeing them.

21 MS. WICK: No further questions, Your Honor.

22 THE COURT: All right.

23 MR. BROOME: Nothing else, Your Honor.

24 THE COURT: All right. Ms. Branch, you are excused.

25 Thank you. All right. I need to meet with counsel.

1 The next stage in this is I am going to give you the
2 instructions on the law. I need to meet with counsel for a
3 few minutes before we do that. So let's take a ten-minute
4 break, please. Okay.

5 (Jury out at 10:28 a.m.)

6 MR. BROOME: Judge, I was just instructing folks not
7 to make any comments.

8 THE COURT: Thank you. All right. What is our next
9 order of business?

10 MR. BROOME: We would rest, Your Honor.

11 THE COURT: Okay.

12 MR. BROOME: Then I would renew my motion for
13 judgment of acquittal. I guess I could do that now.

14 THE COURT: That's fine. I do have a question about
15 that motion. I assume that motion is to all counts; is that
16 right?

17 MR. BROOME: Yes, Your Honor.

18 THE COURT: Okay. For the government, with respect
19 to the wire fraud counts, help me understand, please, what
20 evidence, if any, has the government put in the record that
21 Ms. Branch transmitted by wire communication and interstate
22 commerce some information with respect to the alleged fraud.

23 MS. WICK: Your Honor, if you are asking if the
24 government has put into evidence that she sat down at a
25 computer and submitted the RDR information, she did not.

1 THE COURT: Okay. Is the RDR information the only
2 information that the government has placed in the record that
3 traveled in interstate commerce?

4 MS. WICK: No, Your Honor. The witnesses from
5 Nissan North America also testified that the direct deposits
6 would have come in through the bank accounts. So the funds
7 that they received as a result of the scheme would have also
8 been transferred back. As the accountant, she would have
9 actually been directly responsible for those. The ones that
10 we stipulated to in the facts just happened to be the ones
11 that were RDR'd from Birmingham to Franklin, Tennessee.

12 THE COURT: Say that one more time, please, about
13 the direct deposits.

14 MS. WICK: So the ones that were stipulated to that
15 Your Honor was addressing.

16 THE COURT: What are the ones? Help me.

17 MS. WICK: So if I understood correctly, the one
18 that Your Honor was referring to were the RDR transmissions
19 that Mr. Shepard said he made, sending the RDR from Birmingham
20 Alabama to Franklin, Tennessee.

21 THE COURT: Yes.

22 MS. WICK: If I understood your question was were
23 those the only wire transmissions involved in this case.

24 THE COURT: Okay.

25 MS. WICK: No, because when they submitted that

1 false information and Nissan remitted the funds electronically
2 via direct deposit, which there's been lots of testimony about
3 that lump sum direct deposit and the bank statement that was
4 admitted that showed the \$172,000, unless they walk that money
5 down to the bank, it was transmitted via wire, and the
6 government would submit that that would be sufficient to
7 survive Rule 29.

8 MR. BROOME: If I could respond, Your Honor?

9 THE COURT: Yes, sir.

10 MR. BROOME: But that deposit was a direct result of
11 the RDR's that either Mr. Shepard or someone else wired by
12 internet to Tennessee. It was not anything that Ms. Branch
13 would have done. The monies coming back were in direct
14 response to the RDR's that came from Birmingham by Mr. Shepard
15 or someone else.

16 MS. WICK: Your Honor, that would be why the
17 government alleged in addition to 1343 and (2) because of the
18 aiding and abetting theory of liability; if she aided and
19 abetted in the crime. Then that ended up causing wires to be
20 transmitted. She does not need to be the person who has her
21 finger on the trigger that causes the wire to be transmitted.

22 THE COURT: That's what I am trying to understand
23 whether the government's theory against Ms. Branch rests on
24 anything -- the wire fraud theory -- rests on anything that
25 Ms. Branch did independently, or whether the government's

1 theory is simply that because Ms. Branch, under the
2 government's theory, played a role in the implementation of
3 Mr. Visser's plan, that she is somehow held responsible,
4 through aiding and abetting or through conspiracy for the RDR
5 information that was wired from Serra Nissan to Nissan North
6 America, or the subsequent transmission of the incentive
7 payment from Nissan North America to Serra Nissan.

8 MS. WICK: Okay. So, I think that the answer is is
9 that for all but the fourth element of the wire fraud, the
10 government --

11 THE COURT: I am talking about the fourth element of
12 the wire fraud.

13 MS. WICK: So just for the fourth element, I
14 don't -- did her actions, as part of the conspiracy as a
15 participant in the scheme to defraud, cause those wire
16 transmissions to be transmitted? Absolutely. It's
17 transmitted or caused. And I don't think the government would
18 say that has put on any evidence that Ms. Branch directly hit
19 the button that transmitted those wires. But in terms of
20 submitting evidence that she participated in this scheme that
21 caused all of those transmissions to be submitted, because
22 without all of the accounting that had to be done, it would
23 have been absolutely moot for Mr. Shepard to even RDR those
24 deals. I think the government has absolutely submitted
25 sufficient information that her actions did cause the RDR'ing

1 to be done, did cause the money to come to the account, that's
2 before you even get to the aiding and abetting theory of
3 liability, if that answers the question.

4 THE COURT: And the cause is not that Ms. Branch
5 personally directed anyone to do anything. The government
6 hasn't placed any evidence in the record that Ms. Branch
7 personally caused, by directing someone, to send a wire
8 transmission to Nissan North America. Correct?

9 MS. WICK: Well, Mr. Shepard testified that he got
10 the information from that, from the fake deal jackets, and
11 that those fake deal jackets came to him from Jeff Green. And
12 Jeff Green testified the way he got those deal jackets was
13 that Ms. Branch on four occasions walked them to him.

14 THE COURT: You are not answering my question.
15 Okay. I said, has the government put into evidence -- and
16 maybe I didn't ask the question well, so let me try again,
17 because, I -- come to think of it, I probably messed it up.

18 My question is has the government placed any evidence
19 in the record that Ms. Branch directed -- and when I say
20 directed, I mean personally instructed -- anyone to send the
21 RDR from Serra Nissan to Nissan North America?

22 MS. WICK: No.

23 THE COURT: Okay. I am just trying to go --

24 MS. WICK: I am just trying to think, and I don't
25 want to answer your question incorrectly. But I don't think

1 we have ever in any way said that she instructed anybody to
2 RDR that information.

3 THE COURT: Okay. Okay. So, the government's
4 theory of cause is simply that Ms. Branch, in some capacity,
5 was part of the implementation of Mr. Visser's plan?

6 MS. WICK: Yes. So by participating in the scheme
7 to defraud, which included the misrepresentation of material
8 facts, and acting with the intent to defraud -- and I think we
9 would obviously disagree on some of the facts -- but certainly
10 at a minimum, that when she took those deals, having been
11 instructed by Forest to keep that list in case we get audited
12 and take those deals, and when they come from Cullman, bring
13 them to Jeff so he can make the duplicate jacket, and then
14 Jeff gives those deals to Gerald for them to be inputted into
15 the RDR, she absolutely caused that information to be
16 transmitted.

17 THE COURT: Okay. Thank you.

18 The Court's going to reserve ruling on Ms. Branch's
19 Rule 29 motion.

20 Let's go ahead and talk about the jury instructions,
21 please. You all have what the Court believes to be the final
22 draft of the instructions, but I don't know how much time you
23 all had to review them. So, do you need some time now?

24 MS. WICK: No, Your Honor. The government has no
25 objection to the Court's instructions.

1 MR. BROOME: Ms. Branch does not either, Your Honor.

2 THE COURT: Okay. Why don't we take about a
3 five-minute break, and we'll bring the jury back in to do
4 these instructions.

5 (A recess was taken at 10:44 a.m., until 10:55 a.m.)

6 THE COURT: The Court has given counsel copies of
7 the Court's proposed verdict form. Is there any objection
8 from the government to the proposed verdict form?

9 MS. WICK: Not from the government, Your Honor.

10 THE COURT: Any objection from the defendant?

11 MR. BROOME: No, Your Honor.

12 THE COURT: All right. Thank you. All right.

13 (Jury in at 10:56 a.m.)

14 (Closing Instructions on the Law.)

15 THE COURT: All right. The Court is now going to
16 instruct the jury on the law that applies to this case.
17 Members of the jury, you all have copies of the instructions
18 there with you. You are welcome to read along if you would
19 like to or you may just listen.

20 It is now my duty to instruct you on the rules of law
21 that you must follow and apply in this case. You must follow
22 the law as I explain it to you, even if you do not agree with
23 the law, and you must follow all of my instructions. You may
24 not single out or disregard any of the Court's instructions on
25 the law.

1 There are three basic rules about a criminal case like
2 this one that you must keep in mind. First, the defendant,
3 Ms. Branch, is presumed innocent until proven guilty. The
4 indictment against Ms. Branch is only an accusation, nothing
5 more. It is not proof of guilt or anything else. The
6 defendant therefore starts out with a clean slate.

7 Second, the burden of proof is on the government until
8 the very end of the case. Ms. Branch does not have to prove
9 her innocence.

10 Third, the government must prove the defendant's guilt
11 beyond a reasonable doubt. I will give you additional
12 instructions on this point, but bear in mind that the level of
13 proof required is high.

14 You must decide whether the government has proved the
15 specific facts necessary to find Ms. Branch guilty beyond a
16 reasonable doubt. You must decide the case solely on the
17 evidence presented here in the courtroom. The parties have
18 introduced evidence in a number of forms. First, you heard
19 some stipulations during trial. Stipulated facts are facts
20 that the parties agree are accurate and reliable. You also
21 heard testimony from witnesses, and the parties introduced
22 various documents into evidence.

23 Some evidence proves of fact directly. For example,
24 if a witness saw that it was raining outside, that witness
25 could testify that it was raining. Some evidence proves a

1 fact indirectly. For example, if a witness testified that she
2 saw wet grass outside and she saw people walking into the
3 courthouse carrying wet umbrellas, that testimony would be
4 indirect proof that it had rained. Indirect evidence,
5 sometimes called circumstantial evidence, is simply a chain of
6 circumstances that proves a fact. As far as the law is
7 concerned, it makes no difference whether the evidence is
8 direct or indirect. You may choose to believe or disbelieve
9 either kind and should give every piece of evidence whatever
10 weight you think it deserves.

11 Certain things are not evidence and must not be
12 considered. I will list them for you now:

13 Statements and arguments of the lawyers are not
14 evidence. In their opening statements and closing arguments,
15 the lawyers will discuss the case, but their remarks are not
16 evidence.

17 Questions and objections of the lawyers are not
18 evidence, but witnesses' answers to questions are evidence.
19 You should not think that something is true just because a
20 lawyer's question suggests that it is. For instance, if a
21 lawyer asks a witness, "you saw the defendant hit his sister,
22 didn't you?" -- that question is no evidence whatsoever of
23 what the witness saw or what the defendant did unless the
24 witness agrees with it.

25 Finally, the indictment against the defendant is not

1 evidence of guilt.

2 Your decision must be based on the evidence presented
3 here. In considering the evidence, you may use reasoning and
4 common sense to make deductions and reach conclusions. You
5 must not be influenced in any way by either sympathy for or
6 prejudice against the defendant, Ms. Branch, or the
7 government. You, the jurors, must evaluate the evidence so
8 that you may decide what happened and determine whether Ms.
9 Branch is guilty or not guilty of the crimes charged in the
10 indictment.

11 When I say you must consider all the evidence
12 presented here at trial, I do not mean that you must accept
13 all the evidence as true or accurate. You should decide
14 whether you believe what each witness had to say and how
15 important that testimony was. The number of witnesses
16 testifying concerning a particular point does not necessarily
17 matter. You may believe everything a witness says or part of
18 it or none of it. To decide whether you believe any witness,
19 I suggest that you ask yourself a few questions:

20 Did the witness impress you as one who was telling the
21 truth?

22 Did the witness have any particular reason not to tell
23 the truth?

24 Did the witness have a personal interest in the
25 outcome of the case?

1 Did the witness seem to have a good memory?

2 Did the witness have the opportunity and ability to
3 accurately observe the things he or she testified about?

4 Did the witness appear to understand the questions
5 clearly and answer them directly?

6 Did the witness's testimony differ from other
7 testimony or other evidence?

8 To decide whether you believe a witness, you may
9 consider the fact that the witness has been convicted of or
10 pleaded guilty to a felony or a crime involving dishonesty or
11 a false statement.

12 But keep in mind, that a simple mistake does not mean
13 that a witness was not telling the truth as he or she
14 remembers it. People naturally tend to forget some things or
15 remember them inaccurately. So if a witness misstated
16 something, you must decide whether it was because of an
17 innocent lapse in memory or an intentional deception. The
18 significance of your decision may depend on whether the
19 misstatement is about an important fact or about an
20 unimportant detail.

21 As I mentioned, the law presumes every defendant is
22 innocent. A defendant does not have to prove her innocence or
23 produce any evidence at all. The government must prove guilt
24 beyond a reasonable doubt. If the government fails to do so,
25 you must find Ms. Branch not guilty.

1 The government's burden of proof is heavy, but the
2 government's burden of proof only has to exclude any
3 reasonable doubt concerning the defendant's guilt. A
4 "reasonable doubt" is a real doubt, based on your reason and
5 common sense after you have carefully and impartially
6 considered all the evidence in the case. "Proof beyond a
7 reasonable doubt" is proof so convincing that you would be
8 willing to rely and act on it without hesitation in the most
9 important of your own affairs. If you are convinced that Ms.
10 Branch has been proved guilty beyond a reasonable doubt, say
11 so. If you are not convinced, say so.

12 The indictment contains 16 counts against Ms. Branch.
13 Each count has a number. You will be given a copy of the
14 indictment to refer to during your deliberations.

15 Count One charges Ms. Branch -- Count One charges that
16 Ms. Branch knowingly and willfully conspired to commit wire
17 fraud. Counts Two through Sixteen charge that Ms. Branch
18 committed the substantive offense of wire fraud. Each count
19 of the indictment charges a separate crime. You must consider
20 each crime and the evidence relating to it separately. If you
21 find the defendant guilty or not guilty of one crime, that
22 must not affect your verdict for any other crime.

23 With respect to Count One, the conspiracy count, Title
24 18, United States Code, Section 371, makes it a federal crime
25 for anyone to conspire or agree with someone else to do

1 something that would be another federal crime if it was
2 actually carried out. So under this law, a "conspiracy" is an
3 agreement by two or more people to commit an unlawful act. In
4 other words, it's a kind of "partnership" for criminal
5 purposes. Every member of a conspiracy becomes the agent or
6 partner of every other member.

7 The government does not have to prove that the members
8 of the conspiracy made any kind of formal agreement, and the
9 government does not have to prove that the members planned
10 together all the details of the plan or the overt acts that
11 the indictment charges would be carried out in an effort to
12 commit the intended crime.

13 The heart of a conspiracy is the making of the
14 unlawful plan followed by the commission of an overt act. The
15 government does not have to prove that the conspirators
16 succeeded in carrying out the plan.

17 Ms. Branch can be found guilty of the conspiracy
18 charge in Count One only if the government proves all of the
19 following facts beyond a reasonable doubt:

20 First: Two or more persons in some way agreed to try
21 to accomplish a shared and unlawful plan.

22 Second: Ms. Branch knew the unlawful purpose of the
23 plan and willfully joined in it.

24 Third: During the conspiracy, one of the conspirators
25 knowingly engaged in at least one overt act as described in

1 the indictment.

2 And fourth: The overt act was committed at or about
3 the time alleged and with the purpose of carrying out or
4 accomplishing some object of the conspiracy.

5 An overt act is any transaction or event, even one
6 that may be entirely innocent and viewed alone, that a
7 conspirator commits to accomplish some object of the
8 conspiracy.

9 Although the indictment describes a number of alleged
10 overt acts, the law requires only that you agree unanimously
11 that the government proved one overt act beyond a reasonable
12 doubt, and you must be unanimous in agreeing about the same
13 overt act.

14 A person may be a conspirator without knowing all the
15 details of the unlawful plan or the names and identities of
16 all the other alleged conspirators. So if the government
17 proved that Ms. Branch had a general understanding of the
18 unlawful purpose of the plan and willfully joined in the plan
19 or at least -- on at least one occasion, then that is
20 sufficient for you to find Ms. Branch guilty of conspiracy
21 even though Ms. Branch did not participate before, and even
22 though Ms. Branch played only a minor part.

23 Of course, merely associating with certain people,
24 employers, supervisors, superiors, and co-workers, and
25 discussing common goals and interests does not establish proof

1 of a conspiracy. A person who does not know about a
2 conspiracy but happens to act in a way that advances some
3 purpose of a conspiracy does not automatically become a
4 conspirator.

5 With respect to Counts Two through Sixteen, the wire
6 fraud count, Title 18 United States Code, Section 1343, makes
7 it a federal crime to use interstate wire, radio, or
8 television communications to carry out a scheme to defraud
9 someone else. Ms. Branch can be found guilty of the crimes
10 charged in Counts two through Sixteen only if you find that
11 the government proved all of the following facts beyond a
12 reasonable doubt:

13 First: Ms. Branch knowingly devised or participated
14 in a scheme to defraud or to obtain money or property by using
15 false pretenses, representations, or promises.

16 Second: The false pretenses, representations or
17 promises were about a material fact.

18 Third: Ms. Branch acted with the intent to
19 defraud; and

20 Fourth: Ms. Branch transmitted or caused to be
21 transmitted by wire some communication in interstate commerce
22 to help carry out the scheme to defraud.

23 The term "scheme to defraud" includes any plan or
24 course of action intended to deceive or cheat someone out of
25 money or property by using false or fraudulent pretenses,

1 representations, or promises.

2 A statement or representation is "false" or
3 "fraudulent" if it is about a material fact that the speaker
4 knows is untrue or makes with reckless indifference to the
5 truth and makes with the intent to defraud. A statement or
6 representation, may also be "false" or "fraudulent" when it is
7 a half truth or effectively conceals a material fact and is
8 made with the intent to defraud.

9 A "material fact" is an important fact that a
10 reasonable person would use to decide whether to do or not to
11 do something. A fact is "material" if it has the capacity or
12 natural tendency to influence a person's decision. It does
13 not matter what the decision-maker actually relied on --
14 excuse me -- whether the decision maker actually relied on the
15 statement or knew or should have known that the statement was
16 false.

17 The "intent to defraud" is the specific intent to
18 deceive or cheat someone, usually for personal financial gain
19 or to cause financial loss to someone else.

20 The government does not have to prove all the details
21 alleged in the indictment about the precise nature and purpose
22 of the scheme. It also does not have to prove that the
23 material transmitted by interstate wire was itself false or
24 fraudulent; or that using the wire was intended as the
25 specific or exclusive means of carrying out the alleged fraud;

1 or that Ms. Branch personally made the transmission over the
2 wire. And the government does not have to prove that the
3 alleged scheme actually succeeded in defrauding anyone.

4 To "use" interstate wire communications is to act so
5 that something would normally be sent through wire, radio, or
6 television communications in the normal course of business.
7 Each separate use of the interstate wire communications as
8 part of the scheme to defraud is a separate crime.

9 It is possible to prove a defendant guilty of a crime
10 even without evidence that the defendant personally performed
11 every act charged. Ordinarily, any act a person can do may be
12 done by directing another person or "agent," or it may be done
13 by acting with or under the direction of others. A defendant
14 "aids and abets" a person if the defendant intentionally joins
15 with the person to commit a crime. A defendant is criminally
16 responsible for the acts of another person if the defendant
17 aids and abets the other person. A defendant also is
18 responsible if the defendant willfully directs or authorizes
19 the acts of an agent, employee, or other associate.

20 But finding that a defendant is criminally responsible
21 for the acts of another person requires proof that the
22 defendant intentionally associated with or participated in the
23 crime, not just proof that the defendant was simply present at
24 the scene of a crime or knew about it. In other words, you
25 must find beyond a reasonable doubt, that the defendant was a

1 willful participant and not merely a knowing spectator.

2 There are a few more terms that I need to define for
3 you. You will see that the indictment charges that a crime
4 was committed "on or about" a certain date. The government
5 does not have to prove that the crime occurred on the exact
6 date. The government only has to prove beyond a reasonable
7 doubt that the crime was committed on a date reasonably close
8 to the date alleged.

9 The instructions for conspiracy and for wire fraud
10 both include the word "knowingly." The word "knowingly" means
11 that an act was done voluntarily and intentionally and not
12 because of a mistake or by accident.

13 The instruction for conspiracy includes the word
14 "willfully." The word "willfully" means that the act was
15 committed voluntarily and purposely with the intent to do
16 something the law forbids; that is, with the bad purpose to
17 disobey or disregard the law. While a person must have acted
18 with the intent to do something the law forbids before you can
19 find that person acted "willfully," the person need not be
20 aware of the specific law or rule that her conduct may be
21 violating.

22 "Good faith" is a complete defense to a charge that
23 requires intent to defraud. A defendant is not required to
24 prove good faith. The government must prove intent to defraud
25 beyond a reasonable doubt. An honestly held opinion or an

1 honestly formed belief cannot be fraudulent intent -- even if
2 the opinion or belief is mistaken. Similarly, evidence of a
3 mistake in judgment, and error in management or carelessness,
4 cannot establish fraudulent intent.

5 Those are the Court's instructions on the law. After
6 closing arguments, I will give you a short final instruction,
7 but for now, please listen to the parties' closing arguments.

8 The Court will hear from the government.

9 MS. MURNAHAN: Thank you, Your Honor.

10 (CLOSING ARGUMENTS)

11 MS. MURNAHAN: May it please the Court, counsel, and
12 ladies and gentlemen of the jury. Good morning. On Monday of
13 this week, my co-counsel, Ms. Wick, stood before you and told
14 you that this really is a simple case. It's a case about a
15 bunch of people who got together to lie to Nissan, to get
16 money that they weren't entitled to, and then to cover their
17 tracks so that they would get to keep that money and not get
18 caught.

19 Since Monday, you have heard a lot, probably a lot
20 more than you wanted to about pooling sales and incentive
21 programs and RDR's and booking deals, and all about probably
22 the seedy underbelly of the car sales industry. And I am sure
23 a lot of it was noise to you. But at the close of evidence --
24 now we are at the close of evidence, I submit to you that Ms.
25 Wick's statement is still as true as it was on Monday. This

1 is a simple case about people who got together to lie to
2 Nissan North America about which dealership sold 15 cars, so
3 that Serra Nissan in Birmingham could get money it was not
4 entitled to, and that they could beat an audit on the back end
5 so that they wouldn't get a charge back.

6 Now the Court has just instructed you on the counts
7 that have been charged and the elements that the government
8 must prove in order for you to find the defendant guilty. I
9 don't want to dwell on those too much, but I do want to
10 highlight some of the evidence that the government submits is
11 proof of those elements.

12 Conspiracy, Element Number One: Two or more persons
13 in some way agreed to try to accomplish a shared and unlawful
14 plan.

15 You have heard this week from Randy Visser, from
16 Gerald Shepard, from Forest Housner, from Jeff Green -- all of
17 whom say, yes, we have this plan to lie to Nissan North
18 America and to boge up these deal jackets so we can keep this
19 incentive money that we didn't earn. That was the plan.

20 You heard Randy Visser say he devised the plan. You
21 saw Government's Exhibit 40, what we call the fraud map; the
22 fax that he typed up with his instructions of how to
23 accomplish the plan. So, that's four people right there who
24 devised this plan or agreed to participate in this plan to
25 commit an unlawful act.

1 The second one: The defendant knew the unlawful
2 purpose of the plan and willfully joined in it.

3 There is no question that Ms. Branch knew the purpose
4 of the plan. She knew that they were shifting sales to report
5 cars that were sold in Cullman as being report as being sold
6 in Birmingham. They were lying to Nissan about where those
7 cars were actually sold so that they could get the money. And
8 she also knew that they were creating false paperwork so that
9 they could keep the money, so that they could cover their
10 tracks, and that she willfully joined in it.

11 Now the Court instructed you earlier that for
12 "willfully," you must have -- and actually I have it on here
13 (pointing to screen). To find that someone willfully did
14 something, you must find that the act was committed
15 voluntarily and purposely with the intent to do something the
16 law forbids. But please note that we do not have to prove
17 that the defendant knew exactly which law she was violating.

18 Now Ms. Branch has testified and you have heard that
19 she had no idea any of this was against the law. She had no
20 idea any of this was wrong. Let's think about that for a
21 minute. Ms. Branch started in the car business when she was
22 16; she is now 34. She has been in the car industry for 18
23 years. Over half of her life, she has been involved, in some
24 form or fashion, in the car business. She put herself through
25 school, she graduated in business, and she worked her way up

1 through the ranks. She started out, I believe, she said as a
2 receptionist. She also held jobs as an administrative
3 assistant, then she moved up to office manager, and now, she
4 is a controller. She is the head of accounting of a car
5 dealership. And not just any car dealership, she is the head
6 of accounting of a multi-million dollar multiple dealership
7 car sales conglomerate. That's a lot of responsibility.
8 That's a lot of knowledge she has to have to make this thing
9 work. And she would ask you to believe that she had no idea
10 that lying to Nissan about which dealership sold a particular
11 car and then falsifying paperwork so that they could fool
12 Nissan on the back end, that there was anything wrong with
13 that.

14 Ladies and gentlemen, when you came into the
15 courthouse today, some of you may have -- or some time earlier
16 this week, some of you may have had a pocket knife in your
17 pocket or a camera or something that the courthouse security
18 asked you to take back out and leave in your car or check
19 downstairs. One thing that they did not ask you to check at
20 the courthouse door was your common sense. It is not sensible
21 that the defendant had no idea that there was anything at all
22 wrong with this scheme.

23 The third element: During the conspiracy, one of the
24 conspirators knowingly engaged in at least one overt act as
25 described in the indictment. You'll have the indictment.

1 There are several overt acts that we have alleged in the
2 indictment. An overt act in this case is Kim Branch taking
3 the Cullman deal jackets or deals, walking them over to Jeff
4 Green, so that he could do what he did, falsify the deals.
5 The second time, she gets another batch, takes them over to
6 Jeff Green, so he can do his thing. She does it a third time.
7 She does it a fourth time. Those are overt acts, in
8 furtherance of the conspiracy. If she didn't get those deals
9 to Jeff Green, he couldn't make a false paperwork. Another
10 overt act is Jeff Green making those false deal jackets -- the
11 Birmingham deal jackets. We don't know where they are. We've
12 never found them. But Jeff Green says they existed. And
13 really, if he didn't create them, what was the purpose of the
14 whole thing? If he didn't create them, there would be --
15 there would be nothing for them do in the event -- to pull in
16 the event of an audit. They had to be created because that
17 was the whole purpose of it. So, this element talks about
18 knowingly. And as the Court instructed you, "knowingly" means
19 that it was on purpose. It was not accidental.

20 So for example, I can knowingly throw this pen on to
21 the floor. Or I can accidentally drop my pen on to the floor.
22 In either case, the pen is on the floor. The only difference
23 is my intention in getting the pen on to the floor. So, what
24 you have to decide with respect to the overt act is did Ms.
25 Branch accidentally take those Cullman deals over to Jeff

1 Green four times or did she do it on purpose? Did Jeff Green
2 accidentally create false paperwork for those deals or did he
3 do it on purpose? So that's the third element.

4 The fourth element: The overt act was committed on or
5 around the time alleged and with the purpose of carrying out
6 the scheme. The taking -- the transferring of the deal
7 jackets or the deal paperwork was critical to this scheme;
8 critical to carrying out this scheme. Those false deal
9 jackets had to be created. They all had to be done -- the
10 false paperwork had to be done in order for this scheme to
11 work. So that's Count One on conspiracy.

12 Counts Two through Sixteen, wire fraud. These are 15
13 counts, therefore they're 14 car deals that we're all sick of
14 hearing about at this point, I am sure. In order for you, the
15 jury, to find the defendant guilty of the wire fraud, you must
16 find four elements: That the defendant knowingly, again,
17 purposely, not accidentally, devised or participated in a
18 scheme to defraud, or a scheme to obtain money by using false
19 representations or pretenses.

20 Now we know that the defendant did not devise the
21 scheme. Randy Visser says, this is his scheme, we got a fraud
22 map. No question Randy Visser devised this scheme. Ms.
23 Branch participated in the scheme. How do we know that? And
24 she has admitted she took the deal jackets. She has admitted
25 she made accounting entries. She has admitted she kept track

1 of the deals; she kept a list of them. And in this e-mail
2 that she sent to Mr. Visser, Government's Exhibit 24, when he
3 e-mailed her and said, hey, do these things get booked in
4 accounting in Birmingham? What is her response? In essence,
5 she says, no, Mr. Visser. They did not get booked in
6 accounting, but don't worry, I got it covered. I have a list,
7 I am keeping track, I can manipulate the sales data of
8 whichever dealership Nissan is interested in for an audit and
9 add or remove. I got it covered. Oh, and by the way, Jeff is
10 creating these deal jackets so that we can cover our tracks in
11 case Nissan pulls one of these deals in an audit. She
12 participated in the scheme. And the scheme was to obtain
13 money from Nissan North America by means of false
14 representations. False pretenses. The false representation
15 being that Birmingham Serra Nissan sold these 15 cars when in
16 fact that was not true.

17 Two: The false pretenses or representations were
18 about a material fact. The Court has instructed you that a
19 material fact is important; something that would change the
20 decision in one way or another, depending on what that fact
21 is. You have heard representatives from Nissan North America,
22 and you have actually heard Randy Visser or Gerald Shepard or
23 one of those witnesses testify that they knew that accurate
24 RDR reporting, accurate reporting of which dealership sold a
25 car was important to Nissan North America. It was material.

1 Why is it important to them? Because it affects the incentive
2 money that they have to pay out. Why would they want to pay
3 out thousands of dollars to a dealership that didn't actually
4 sell the cars? It affects what they pay out. So, of course,
5 it's material.

6 The defendant acted with the intent to defraud.
7 Intent to defraud in this case means that the intention was to
8 deceive or cheat somebody, usually, out of money. That's
9 exactly what they were doing. They intended to deceive Nissan
10 North America to cheat them out of money. That's the intent
11 to defraud, and the defendant knew that that was the purpose
12 of this plan.

13 The defendant transmitted or caused to be transmitted
14 by wire some communication in interstate commerce to carry out
15 the scheme. There are a couple of points I want to focus on
16 here. One is the interstate commerce, boring, blah, hmm --
17 okay. There's a stipulation between the parties, you will see
18 it, it's in evidence, that says that the United States has
19 satisfied that interstate commerce portion of it.

20 MR. BROOME: Your Honor, I am going to object to
21 that comment. That's not what that stipulation, says, Your
22 Honor.

23 THE COURT: Which specific stipulation is it?

24 MR. BROOME: I think there's a difference in
25 stipulating that wire transfers or transmissions were made and

1 stipulating that they satisfied that requirement.

2 MS. MURNAHAN: All right. That's okay. We have
3 evidence that there were wire transfers in interstate
4 commerce. One, you heard from Gerald Shepard. He said that
5 he took the deal jackets, the boged up deal jackets that Jeff
6 Green handed to him, and he entered that information on to
7 whatever the system is that Nissan requires to RDR that car;
8 to report the report sold. He entered all that information in
9 the system, and he pushed a button and he was here in
10 Birmingham when he did it. And that information traveled
11 through the internet, and all the wires -- and I don't
12 understand all that stuff -- but it ended up at the
13 headquarters of Nissan North America, which is in Franklin,
14 Tennessee, and you heard Nissan representatives testify to
15 that. So I will submit to you that the United States has
16 satisfied with or without a stipulation that portion of that
17 element.

18 The defendant transmitted or caused to be transmitted.
19 The defendant did not push the button. She didn't. She
20 caused to be transmitted by participating in the scheme. This
21 leads me to another theory of liability in this case which is
22 aiding and abetting. A defendant can be held criminally
23 liable for the acts of someone else if that defendant aids and
24 abets that person in the commission of the crime. To aid and
25 abet, the defendant has to willfully -- or no, voluntarily or

1 intentionally associate with that other person in a crime.
2 This person, the aider and abettor cannot just be in the wrong
3 place at the wrong time. They have to willfully or
4 intentionally join in the scheme. You must find beyond a
5 reasonable doubt that the defendant was a willful participant,
6 not merely in the wrong place at the wrong time.

7 Ladies and gentlemen, all the evidence in this case
8 points to the fact that the defendant knew exactly what this
9 scheme was about. She knew exactly what they were doing. She
10 knew her role in it. She knew all of the mechanics of how
11 this had to be done, and she especially knew the mechanics of
12 how to get past an audit. She knew exactly what she was
13 doing.

14 In conclusion, on Monday Ms. Wick told you a story
15 about when she was in high school and she had a wreck with her
16 car, her red car, and she was scared of what her family would
17 say, her parents would say. And so she got out her red nail
18 polish and she started dabbing it on the scratches on the car,
19 and her mother caught her. If the defendant did not know that
20 there was anything wrong with what they were doing, why cover
21 it up? If you don't know there's something wrong, if she
22 thought Nissan North America would be completely fine with
23 what they were doing, why did they need to cover it up? Why
24 cover it up?

25 So at the end of your deliberations, the government

1 asks you to return the only verdict that is possible and that
2 is guilty on all counts. Thank you.

3 THE COURT: All right. Mr. Broome.

4 MR. BROOME: Yes, Your Honor. May it please the
5 Court, ladies and gentlemen of the jury, ladies of the
6 government. Last night, I was walking around my neighborhood
7 with two dogs. I have three. One is a cocker spaniel, he is
8 eight years old, and he doesn't want to walk anywhere. And I
9 am walking with my other two dogs, and I am trying to come up
10 with something brilliant to tell you folks to convince you
11 that the government has not proven their case beyond a
12 reasonable doubt as to any of these charges. And it finally
13 dawned on me after about a half a mile or so, that this is not
14 the typical case that I am used to defending. I am used to
15 defending the Jeff Greens of this world. And I am used to
16 defending murders and rapists. And I am used to defending
17 folks that -- to be quite frank with you -- 95 percent of them
18 are probably guilty.

19 There was something about this case that was
20 different. This nice lady right here, Kim, not only not
21 guilty, she is completely innocent of doing anything criminal
22 with an unlawful intent, with any intent to defraud, with any
23 intent to steal money from Nissan North America. That's what
24 was different about this case. That's what made it so hard
25 for me to come up with something to tell you good people. But

1 we will try.

2 The government, they get to go before me and they get
3 to go after me, and I only get to go in the middle. So this
4 is my one chance to address you good folks. Several things I
5 would like for you to think about, throughout this entire jury
6 deliberation process -- and I will tell you now that I am a
7 very, very firm believer in the jury system.

8 Juries in our country stand between an individual,
9 Kim, and the vast powers of the United States government.
10 They got agents, they got investigators, they got U.S.
11 attorney's offices, they got the power to issue subpoenas,
12 they got the power to get folks indicted, and they got the
13 power to bring folks to trial. But they don't have the power
14 to convict folks until they convince you good people, beyond a
15 reasonable doubt, that Kim did what they say she did, and that
16 not only that she did it, but that she did it with the intent
17 to defraud, with some unlawful purpose, with some illegal
18 purpose. And that's why I am such a firm believer in our
19 system.

20 You folks took an oath on Monday to well and truly try
21 all the facts, and I know that's what you will do. And I know
22 that when it's all said and done, you will render a verdict of
23 not guilty of all 16 counts.

24 Now one thing I would like for you to think about all
25 the way through everything that Ms. Murnahan said and Ms. Wick

1 says is the presumption of innocence. The judge has already
2 told you, and it's in those jury instructions, the presumption
3 of innocence alone, bites out without nothing else, is enough
4 to acquit someone.

5 You know our forefathers, we have a constitution and
6 that's in the constitution. It also says and the judge also
7 told you in those jury charges, you have to be convinced of
8 each and every element beyond a reasonable doubt. So when I
9 am talking and Ms. Wick is talking and during, most
10 importantly, during your deliberations, you got to keep
11 presumption of innocence in your mind, and you have got to
12 keep reasonable doubt in your mind.

13 I told you at the beginning, I am kind of a sports
14 nut. It's not a baseball game where you win three to two.
15 It's not a football game where you kick the last second field
16 goal and win 17 to 16. It's a trial.

17 The judge told you in her charges, and you will have
18 it with you, that the government's burden is very high. It's
19 not beyond all doubt, it's not a hundred percent doubt.
20 Because typically, if it was a hundred percent, you would have
21 to have seen it, then you would not be a juror, you would be a
22 witness. But that burden is very, very high, and that's what
23 protects our citizens against the government.

24 There's one other thing while I am talking and Ms.
25 Wick is talking, I would like for you to keep in mind. The

1 judge has charged you --

2 JURORS: We can't see it.

3 THE COURT: Are your monitors on, or are they black?

4 JURORS: They don't do anything.

5 THE COURT: Can you see the government's monitor
6 there?

7 MR. BROOME: Yes, it's coming from the last page.
8 That's what happens when I try to use machinery. Let's just
9 turn to the last page please or page 11. It's just really not
10 meant for me to use machines.

11 Page 11, starting with the third paragraph, "good
12 faith." The judge has already charged you and you will have
13 these instructions with you. "Good faith" is a complete
14 defense, "complete defense to a charge that requires intent to
15 defraud." And that's what this case is all about -- intent to
16 defraud. "A defendant is not required to prove good faith."
17 But we tell you that we have. "The government must prove
18 intent to defraud beyond a reasonable doubt." To me this
19 sentence is the most important. "An honestly held opinion or
20 an honestly formed belief..." cannot, "...cannot be
21 fraudulent intent -- even if the opinion or the belief is
22 mistaken. Similarly, evidence of a mistake in judgment, an
23 error in management, or carelessness cannot establish
24 fraudulent intent."

25 We would say that that paragraph alone was enough to

1 convince you that Kim is not guilty of any of those 16 counts.
2 She had "complete defense," folks, that's what it says.

3 She has told you -- and I started off with the
4 fairytale story on Monday about a young lady who goes to
5 school and gets a good job, gets a house with her husband and
6 two children, and it's just another day at work in March. And
7 her mentor or father figure -- and I tell you, we all feel
8 badly for Mr. Housner in his current health problems. I think
9 we would all agree that's not the man folks describe back in
10 March of 2013. But if there was anybody that you could trust,
11 just from looking at that gentleman, it would be Forest
12 Housner.

13 That day Kim comes to work like any other day, and she
14 is trying to clean up things there at the dealership. And I
15 don't know about all of the accounting principles, but it's a
16 pretty stressful situation trying to get things done. She's
17 got nine people, I think, she said working under her. But
18 that day in March, Forest says to her, we got to transfer or
19 shift -- whatever word you good people want to use -- some
20 deals from Cullman to Birmingham, because Birmingham is not
21 going to meet their mark. It sounds fairly innocent. It
22 doesn't sound so illegal to me. Especially when you consider
23 that in the context of what Kim thought, not what a lawyer
24 might think, but what she thought at the time. Well, we have
25 done this before with parts. We have done this before with

1 accessories and maintenance equipment. We have done this
2 before to meet incentives. We have sold parts from Cullman to
3 Birmingham, and we have sold parts from Cullman to Birmingham.
4 We have done it before. Now, I agree just because you have
5 done something before doesn't always make it right. But if
6 you have done it before, that's what you are thinking about.
7 Nobody said that was wrong. Nobody had ever told her, but we
8 got to hide this. That's the frame of mind that Kim Branch
9 had on that day. You heard her tell you today, yes, after I
10 have talked with the lawyers and after my life has been -- I
11 am not going to use the word I wanted to -- difficult for the
12 last six to nine months with all of this going on, I know not
13 to do this again. I know this is now wrong after I talked to
14 lawyers, come to court, everything.

15 That day, March 2013, what was her state of mind? Now
16 we can't look in somebody's mind and see what their state of
17 mind was. You have to go by what you heard. What you heard
18 was Forest had done this before, we had done this before, not
19 with cars now, but with parts and accessories. I had written
20 the checks for them. I paid the invoices back and forth. I
21 knew it was so Cullman could win some prizes.

22 The same thing we have here. My mentor, my father
23 figure, my number one person at that dealership, he would
24 never tell me to do something wrong. Never crossed her mind.
25 Never crossed her mind that this is an intent to defraud

1 anyone. And he tells her to do two very, very simple and
2 very, very, very innocuous things. One, keep a list of deals,
3 okay? And two, when the Cullman deal jackets come -- which
4 they come every day down to Birmingham, so that's not
5 unusual -- when the Cullman deal jackets come the rest of the
6 time, this time period of this incentive, carry them to Jeff.
7 Well, that's what she did. Whether she called them or took
8 them over there, I don't think it really matters, but she got
9 the deal jackets to Jeff. Like she said, they told her to do
10 it, like her mentor told her to do; the man she trusted.

11 You have heard testimony from Randy Visser that he
12 said it's a hundred percent my idea, and I told Mr. Housner
13 this is what we're going to do. Forest tells Kim, do these
14 two things. Do these two things. Make a list, which she did,
15 and carry the deals to Jeff.

16 Now things, you know, I asked -- maybe I asked it in a
17 sarcastic way. Were there any smoke-filled rooms where you
18 guys sat around and figured out let's do A, B, and C so we can
19 defraud Nissan? Nobody said that.

20 In fact, I told you in opening statement, a lot of
21 times what you don't hear is more important than what you do
22 hear. Just to make sure that I get this right. I need to
23 look at my notes. Mr. Byrnes, the DOM or the dealer
24 operations manager, what did he tell us? Let's start with
25 what he didn't tell us. He didn't tell us he dealt with Kim

1 about the rules of the contest or the rules of the incentive
2 program. I think he said, I met her at the grand opening of
3 the Cullman store. That was it. You didn't hear Mr. Byrnes,
4 say, I told her you can't be swapping deals. I told her that
5 was illegal and that was wire fraud. He swapped the deals.
6 You didn't hear that. Because it didn't happen. I also asked
7 him did you ever give her your manual or your instructions or
8 anything for how to do this one? No, I would have talked to
9 Randy Visser, Forest Housner, Gerald Shepard, Jeff Green, and
10 there may have been others that he talked to.

11 You heard Mr. Randy Visser say, once I found out about
12 this, I tried to pay the money back -- this \$64,800. And I
13 think Mr. Visser said something along the lines that Mr.
14 Byrnes said, just let sleeping dogs lie. You can't undo it.
15 Just let it lie. But you didn't hear Mr. Byrnes say he had
16 any direct contact with Kim Branch. Then you also heard Mr.
17 Byrnes say I believe -- and folks I have been living with this
18 case for several months, and I have read thousands of
19 documents about this. So if I tell you something that you
20 remember that's wrong, that I said, I can assure you I didn't
21 do it on purpose. But please hold that against me and don't
22 hold that against Kim. I promise you I will not intentionally
23 tell you something that's wrong.

24 Mr. Creecy -- let me go back to Mr. Byrnes. I said
25 anywhere in those rules, if, in fact you had read them does it

1 say anything about that it's illegal to pool sales? He said,
2 no.

3 Let's go to Mr. Creecy, I think that's how you
4 pronounce his name. I believe he said he may have talked to
5 Kim about getting some deal jackets for one audit, but that he
6 didn't talk to Kim about the incentive plans. Kim wasn't
7 involved in his closing meeting that he had. I think it was
8 just Forest Housner and Randy Visser. He didn't talk to Kim
9 about that. He made a whole lot to do about those audits, and
10 she has only been three or four months, and that audit didn't
11 cover but like a month or two when she was there. But then he
12 did deal with her as far as pulling the deal jackets. Again,
13 I asked him, anywhere in those instructions or dealer plans or
14 franchise agreements about not pooling resources; he looked at
15 it, and he says, no, but it's just understood you are supposed
16 to do that. Well, it doesn't say that in their agreement.

17 Then Ms. Strickland came in and said, you know, I
18 heard about years ago it was okay for sister stores to pool
19 resources together. We kind of phased all that out. One time
20 it was okay. She gave us the figure \$64,800 with all her
21 calculations. Again, what you didn't hear was Ms. Strickland
22 ever talking or communicating with Kim Branch.

23 Then we had Randy Visser who says, a hundred percent
24 my idea. 100 percent my idea. And Mr. Visser has pleaded
25 guilty to it for what he did. I asked Mr. Visser, did you

1 have any direct contacts with Kim? And I believe he said, no,
2 with the exception of those e-mails. And we'll talk about
3 that in a few minutes. I asked Mr. Visser, did you and Kim
4 sit down in a smoke-filled room and plan how we're going to
5 defraud Nissan North America -- defraud Nissan North America?
6 And he said, no. I asked him these fraud plans or fraud
7 instructions or whatever the government calls them, did you
8 ever share those with Kim? You didn't hear at that. He said
9 no. They had no evidence that Kim ever saw those fraud
10 instructions, and there's a good reason they don't have any
11 evidence of that because it didn't happen.

12 Then Mr. Visser and I talked about he tried to pay the
13 money back, but you heard what Mr. Visser said. 100 percent
14 my idea. Then we had Mr. Housner that testified. He
15 testified Randy Visser tells me this is what we're going to
16 do, we're going to move the deals the rest of the month from
17 Cullman to Birmingham, so Birmingham would meet their
18 objectives. He agreed that Forest -- Forest agreed that Mr.
19 Visser had told him what to do.

20 Again, nothing did you hear about any meetings of the
21 mind or agreement -- now I understand very few conspirators go
22 to lawyers and make out a contract at how they're going to
23 make the conspiracy. But you didn't even hear any testimony
24 about anybody talking to Kim about, you know, this is illegal,
25 you do know that? I just want to tell you in case you don't

1 want to participate. Nobody said that to Kim because it
2 didn't happen.

3 Mr. Housner said Mr. Visser tells me to use the
4 Cullman deal. And I am not going to belabor what Mr. Housner
5 said because you folks heard him and heard his demeanor
6 testifying here -- but there's no question he told Kim, gave
7 her some instructions, make a list, carry the Cullman deals to
8 Jeff.

9 One important thing that Mr. Housner did remember --
10 and I am sure you guys will remember this -- yeah, we used to
11 do that when I was in parts and service. We would sell
12 maintenance equipment, maintenance parts -- and I think he
13 even said oil filters and air filters and things. If there
14 was a contest, we would have Cullman sell them to Birmingham,
15 so Cullman could win some incentives. You folks heard him say
16 that. He remembered that because that's happened.

17 Again, Kim told you, I wrote checks from Cullman to
18 Birmingham and then from Birmingham to Cullman. It goes to
19 her state of mind at the time she did what she did. If it's
20 okay with parts and maintenance equipment, why wouldn't it be
21 okay with cars?

22 Then Harold Yelverton came in, the general manager.
23 He said Forest Housner told me to stop RDR'ing cars from
24 Cullman and send the deals to Birmingham. I think and I am
25 pretty sure that I asked him, Kim didn't tell you that, did

1 she? And he said, no, Forest told me to do that. Forest
2 faxed me -- remember he had the fax -- Forest faxed me those
3 instructions of what I was supposed to do. I asked him, did
4 Kim send you those instructions, or did Kim do anything about
5 transferring those deals from Cullman to Birmingham? And he
6 said, no. I think he said he told Greg Boyles about no more
7 RDR'ing cars in Cullman, and a finance man, no more RDR'ing
8 cars in Cullman during this period. I think Mr. Yelverton
9 also said, I had very little or not much contact with Ms.
10 Branch.

11 Then we had Gerald Shepard. Personally, I thought
12 Gerald really was a pretty interesting character. He talked
13 about incentives and the warranties followed the RDR's, and
14 we'll talk about that in a minute. He talked about the first
15 conversation he had about shifting sales was with Forest
16 Housner. I asked him, was Kim Branch present during those
17 discussions? No. He said he did have some conversations with
18 Ms. Branch talking about that audit process that they had just
19 gone through months before about pooling deals.

20 Then we had Greg Boyles. And I got the impression he
21 was a little upset about not getting the trip to Las Vegas,
22 and I probably would have, too, because that seemed pretty
23 interesting, going in that warehouse and picking up as much
24 stuff as you could. But Greg Boyles told us, Harold Yelverton
25 told him to stop RDR'ing cars in Cullman, not Kim Branch. I

1 asked him if he had any contact with Kim during this period of
2 time, and I believe he told me no contact with Kim about
3 transferring any deals from Cullman to Birmingham.

4 Then we had Jeff Green. Well, as I told you, Jeff is
5 the kind of guy that I usually end up representing. That guy
6 can make anything. He could make utility bills, he could make
7 bank statements, he could make -- well, you heard what all he
8 could make. He could bogus up the amount of your deals. He
9 could inflate your incomes. He could bogus up income
10 statements. This guy could do just about anything. And the
11 only reason I tell you that, when he says he gave the deal
12 jackets back to Kim, who are you going to believe? You got
13 Kim on one side saying, I don't think he ever gave me -- I
14 believe he never gave the deal jackets back to me, or he
15 didn't give the deal jackets back to me. But you got an
16 admitted convicted felon of bank fraud, consumer fraud, I
17 guess you could forget not pleading guilty to an income tax
18 evasion fraud, who can make up any and all documents in the
19 world, so who are you going to believe?

20 The judge gave you some instructions about
21 credibility. Are you going to believe Jeff when he says, I
22 gave the deal jackets back to Kim, or are you going to believe
23 Kim when she says, I never got the deal jackets back?

24 Then you have Ms. Branch, Kim, a nice lady. And
25 again, I concede nice folks commit crimes. Just not that one.

1 You know, I really don't have the capacity to convey to you
2 folks she didn't do this, other than just keep telling you she
3 didn't do this.

4 Again, we're back to page 11 there talking about the
5 "good faith." It's a "complete defense," folks. That's what
6 it says in the judge's charge. If you believe, Kim Branch
7 acted in good faith with "an honestly held opinion" or an
8 "honestly formed belief," it cannot be fraudulent intent. If
9 you can't get past the fraudulent intent, the game is over.
10 Back to sports. You have to find her not guilty because she
11 is not guilty.

12 Now, several other things that I would like to talk to
13 you about -- we won't go over my feeble attempt at math, but I
14 would just like to remind you -- and again, I concede if you
15 steal a dollar, it's the same thing as stealing a million
16 dollars. But sometimes we have to use our logic a little bit.
17 \$1,296, if I'm right. Why risk everything, your life, your
18 reputation in the community for \$1,296? And again, don't get
19 me wrong, you steal a dollar from me, you are a thief just
20 like you stole a hundred dollars from me. But it's something
21 to think about.

22 Another thing to think about, the cast of characters
23 of this enterprise -- on a personal note, I will say it's
24 interesting to have my son with me here -- I just wanted to go
25 over the cast of characters that are involved in this. We got

1 Mr. Visser, and he has been charged, and he has pled guilty.

2 I am just talking about this conspiracy. There's a whole
3 separate conspiracy, let's don't get that confused that had to
4 do with a consumer fraud that Mr. Shepard pled guilty to and
5 Mr. Green pled guilty to, and I think they said seven or eight
6 others. While on that subject, no evidence, no, none, zero
7 that Kim was ever involved in that.

8 Then we got Mr. Housner. I am not sure I am spelling
9 his name right, and he has not been charged. But you heard
10 everybody say he was the number two guy, he's not charged.
11 Then we had Mr. Yelverton, who said he got one of those target
12 letters. He didn't report the cars from Cullman. He didn't
13 RDR the cars to Cullman that were moved to Birmingham. He has
14 not been charged. Then we got Mr. Boyles, who said I didn't
15 RDR anymore cars because they told me not to. He has not been
16 charged. I am just going to start putting a line right there
17 (writing to board).

18 Well, then we got Mr. Shepard who says, oh yeah, I
19 RDR'd the cars in Birmingham, he has not been charged. And I
20 will save the best one for last.

21 Mr. Green -- you will have the documents back there,
22 but I went over, in my mind, just adding up things; forged
23 about 300 signatures on all those documents, which he said he
24 created, which we have never seen. And he fraudulently
25 entered and made up the bill of sales and contracts and all of

1 that, and he has not been charged.

2 But, Mr. Visser and Mr. Shepard and Mr. Green have all
3 pleaded guilty to various things and are all hoping the
4 government is going to recommend a lesser sentence to a judge
5 in their case for coming in here to testify. So you can take
6 that into consideration as to why they said what they said.
7 Not really putting anything on Kim anyway.

8 A couple other things I would like to go over with
9 you, one, if you remember Monday, I gave you an example, I
10 asked one of you good folks to give me a ride to the bank, and
11 that I got within maybe -- or we got within a couple of blocks
12 of the bank, well, you know, there's a lot of traffic down
13 there, I have been to this bank, there's not any parking, why
14 don't you just pull over right here. And I need the exercise,
15 and I will walk on to the bank. And I go in the bank, and I
16 rob the bank, and I walk back to the car. Nothing unusual. I
17 get in the car, and say, okay, let's go back to the federal
18 building. And about that time Birmingham's finest starts the
19 sirens. Are you a co-conspirator with me to rob that bank? I
20 robbed the bank. You drove the getaway car. You did an overt
21 act which helped me rob the bank. But again we go back to the
22 charge of "good faith." You had "an honestly held opinion" or
23 an "honestly formed belief" that all you did was drive me down
24 there. I agree that's in a different context than this. I
25 don't think it's very much of a leap to put that over into

1 this case.

2 If you believe Kim honestly didn't believe anything
3 was wrong or illegal with what she did at the time, you have
4 to find her not guilty. Please keep in mind, this is the last
5 time I get to talk to you about this, the burden is on those
6 folks to prove her guilty beyond a reasonable doubt. Think
7 about the presumption of innocence. She is presumed to be
8 innocent. So every time you are back there looking at a
9 document in that room, looking at a document or going over
10 testimony, just keep thinking the burden is on those folks to
11 prove me guilty beyond a reasonable doubt and the presumption
12 of innocence.

13 Folks, I know I have taken up a lot of your time. You
14 have been very attentive and I thank you on behalf of Kim. I
15 am going to ask you good people to find that young lady not
16 guilty of all of these charges and send her home to her family
17 just like she came in the courtroom Monday an innocent person.
18 Thank you.

19 Thank you, Your Honor.

20 THE COURT: All right. Rebuttal?

21 MS. WICK: Your Honor, I apologize, if it wasn't
22 code red, I would not ask, but may we take a two-minute
23 restroom break?

24 THE COURT: Yeah, I was going give the jurors a
25 chance to stand and stretch. So if you need a restroom break,

1 too, that's fine.

2 MS. WICK: Thank you, Your Honor.

3 THE COURT: Let's take a five-minute break, please.

4 (Jury recess at 12:18 p.m.)

5 MS. WICK: Your Honor, before we go on a break, I
6 just wanted to ask, I know we were taking a brief bathroom
7 break, but I just realized it's 12:18 --

8 THE COURT: I am not going to break for lunch. I am
9 going to ask the jurors to please listen to the rest of the
10 arguments.

11 MS. WICK: I know we said there were no time limits,
12 it's just now the government is the only thing standing
13 between them and their lunch break. What time did you hope to
14 break them for lunch?

15 THE COURT: Whenever you are done.

16 MS. WICK: Okay, Your Honor. Thank you.

17 (Recess taken at 12:20 p.m., until 12:27 p.m.)

18 THE COURT: Just with respect to the lunch break, I
19 am going to give the jury an instruction to let them know that
20 this is the Court's decision to go forward. I did give the
21 government the advantage last night when Mr. Broome asked for
22 us to finish up Ms. Branch's cross examination. The
23 government asked to take a break, and I gave the government
24 the advantage of coming in this morning and starting fresh.
25 So I think it's only fair that we go ahead and complete the

1 closing arguments.

2 MS. WICK: Yes, Honor, we appreciate your
3 instructions.

4 (Jury in at 12:29 p.m.)

5 THE COURT: Ladies and gentlemen, I just wanted to
6 let you know, I do know what time it is and I know you are
7 probably hungry. It's important with closing arguments to
8 hear everything together and in context. So I apologize to
9 you for making us run later today through the ordinary lunch
10 hour, and I appreciate your patience with arguments and ask
11 you to pay full attention to the government's rebuttal
12 arguments.

13 All right. Ms. Wick.

14 MS. WICK: Thank you, Your Honor.

15 Ladies and gentlemen, I apologize. I know I am all
16 that stands between you and lunch, so I really am going to try
17 to keep this brief. You probably heard my stomach growling,
18 so I am with you.

19 There were a few things that Mr. Broome said in
20 rebuttal that I wanted to address. Every day really good
21 people make really bad decisions. Nobody is here because the
22 government hasn't charged Ms. Branch with being a bad person.
23 I don't know her. She may be a really good person. That's
24 not what she is charged with. What she is charged with is one
25 count of conspiracy and 15 counts of wire fraud that took

1 place in March 2013. Because when Forest Housner came to her
2 and said, here is what we're going to do, we're going to shift
3 these sales from Cullman to Birmingham so that we can hit the
4 big money incentive at the end of the month, you need to keep
5 a list of these deals on your desk in case we're audited,
6 because you are the one who submits the financial information
7 to Nissan when they ask for that initial red flag check. And
8 when the deals come down from Cullman, you need to bring those
9 to Jeff Green so he can make Birmingham deal jackets. Because
10 in case they pull those during the audit, we have to make sure
11 that the Birmingham deal jacket matches -- the accounting
12 information matches the RDR information. I just want to give
13 a minute for that to sink in.

14 All of the other evidence in this case, all of the
15 talk about warranties and all of the booking and accounting
16 are all the nomenclature. Do you have that page 11 that Mr.
17 Broome was talking about? I want you to hold it in your hand.
18 It says, "an honestly held opinion," "an honestly formed
19 belief." Mr. Broome is absolutely right. The government has
20 a very high burden. We have to prove, beyond a reasonable
21 doubt, that in March 2013, not today -- in March 2013, she
22 knew that what she was doing was wrong. The government would
23 submit to you that it is not in any stretch of the imagination
24 plausible, that at the time she was maintaining that list to
25 evade the first part of the audit or the time -- the four

1 times that she was schlepping those deals over to Jeff Green
2 for him to make false deal jackets, that she did not know the
3 purpose of that was to evade an audit. You know one of the
4 craziest things that I heard during the course of this trial?
5 These words: Mr. Housner's instructions were very innocuous.
6 It's not clandestine to create fake deal jackets. It's not
7 that wrong to evade an audit. Just saying that in a higher
8 pitched voice does not make it any less incredulous and false.

9 The Court told you a couple of minutes ago, and my
10 co-counsel represented to you that one of the most important
11 things that you came with into this courtroom was your common
12 sense. And I can't even remember, but I remember some people
13 said that they had accounting backgrounds. And I don't know
14 if it's any of you, I failed accounting, so please don't rely
15 on me.

16 But I will tell you this, does your common sense tell
17 you that when somebody has to create a set of false documents,
18 fake deal jackets to evade an audit that, she didn't know that
19 was wrong? And to be clear, I want to be a hundred percent
20 clear. She admitted on the stand, she knew when she made
21 those four trips to Jeff Green, the purpose of that was for
22 him to create the fake Birmingham deal jackets like Forest
23 instructed her to do. There is absolutely no dispute that she
24 knew, on all four of those trips, that what she was doing was
25 bringing the original Cullman deal jacket to the guy at the

1 dealership who was renowned for making fake documents, so that
2 he could make fake deal jackets.

3 I hope the irony is not lost on you that Mr. Broome
4 would not like you to believe a word of what Mr. Green said,
5 because he is a terrible guy for making false documents.
6 Because he made false utility bills, he made false bank
7 statements, he made all these false documents. But he wants
8 you to forget who walked over the four sets of real documents
9 for Jeff to create the fake deal jackets. Because as far as
10 the government is concerned, two people testified on the stand
11 that Jeff was going to create those fake deal jackets, and
12 that Ms. Branch was the one who gave them to him, knowing that
13 was his purpose. Is that any different? Is Mr. Greene any
14 different because he was the one that signed the forms? Then
15 she was walking it over saying here are the documents for you
16 to create fake deal jackets so we can evade this audit?

17 That badge on your shirt says "juror," not "born
18 yesterday."

19 I would like to address Mr. Broome's chart, and I am
20 sorry there's no way this is going to go well without this
21 working. There's no way for us to be able to see it, Your
22 Honor, I just apologize. (Poster board displayed.)

23 Mr. Broome made one error. Mr. Yelverton did not
24 testify that he got a target letter, it was a proffer letter,
25 but the rest of this is relatively accurate. But here is the

1 thing. All of these people, what they have in common that
2 they testified to cooperation agreements with the government;
3 wherein they came in, accepted responsibility, and told the
4 truth to the government; admitted they lied, admitted they
5 knew what was wrong, and admitted everything that they did to
6 the government.

7 Mr. Yelverton even told you on the stand, you know how
8 he -- he knew it was wrong. He kept a fax for two years,
9 folded up in his records marked RDR's from Serra Visser Nissan
10 to Serra Birmingham because he knew the day that somebody came
11 knocking, he was going to need the somebody-told-me-to-do-this
12 card. Every single one of these guys testified that they knew
13 it was wrong. They knew they were lying, they knew they were
14 deceiving Nissan, they knew about the audit process, they knew
15 that if they got caught, there was going to be a charge back
16 and they would all lose money. People getting paid on the net
17 would lose money which included the defendant. Ms. Branch is
18 the only person who wants you to believe that she needed an
19 instruction that said, don't lie, don't cheat, and don't
20 steal, in order for her to know how to do her job as the
21 controller for a multi-million dollar car dealership.

22 When you go back and you look at the evidence of this
23 case, you are going to see lots of documents. You are going
24 to see all of the 15 deal jackets, which basically are the
25 Cullman deal jackets.

1 Mr. Broome talked about our vast powers. You know
2 what we did? We issued a subpoena that said can you give us
3 these? You know what they gave us? The Cullman deals.
4 Because they sure weren't going to give us the fake ones. We
5 never got the fake ones, we'll never -- nobody's ever going to
6 say to you where those fake ones are, whether they're at the
7 bottom of the ocean, at the bottom of a shredder, nobody knows
8 where they are. All we did was ask for them. Not
9 surprisingly, they gave us Cullman and not Birmingham, in one
10 of the many steps to cover up what they had done.

11 You heard Mr. Visser testify that on June 17th, 2014,
12 he found out about our subpoena. Now Ms. Branch said she did
13 not realize that was these 15 deals until, oh, some time
14 before August 1st, 2014. But you heard Mr. Visser testify
15 that the next day, June the 18th, 2014, he was e-mailing
16 Patrick Byrnes at Serra Nissan. Hey, we've got 15 deals
17 coincidentally. We just got to make this right. What can I
18 do? Can I leave it? Can I leave it? Let me text you. Can I
19 leave it? Please tell me. I can leave it.

20 What did Patrick Byrnes say? Mr. Visser said let
21 sleeping dogs lie. Mr. Byrnes did not say that on the stand.
22 Let me be clear. Mr. Byrnes did not say he said let sleeping
23 dogs lie. He said, unwind the deals, just unwind them. He
24 didn't know there was a time limit on that. Mr. Creecy said,
25 no, they couldn't do that because it was outside of the audit

1 period.

2 What did Mr. Byrnes tell you? When Mr. Visser called
3 him on the phone, he said we accidentally RDR'd these deals.
4 Accidentally RDR'd them. After devising that fraud plan in
5 Government's Exhibit 40, he had the nerve to call Mr. Byrnes
6 the day after he got a subpoena from the government and said
7 we accidentally RDR'd these deals. Come on now.

8 Then after Byrnes sends the e-mails that says this is
9 pooling of sales, which some people know the term, some people
10 don't know the term. You know what everybody knows, that when
11 you are making false documents to cover something up, when you
12 are evading an audit, that's fraud. You know who knows that?
13 Accountants. Especially accountants that get paid \$150,000 a
14 year to run a multi-million dollar car dealership.

15 You are going to go back in the jury room, and you
16 have, I think, 45 exhibits. You are going to have days of
17 testimony. And you have to ask yourself at the end of the
18 day, is it plausible that she honestly didn't know when she
19 was e-mailing Mr. Visser, yeah, I didn't book those in
20 accounting. I have them on my desk, stapled to the e-mails
21 that you sent me in the event that we get audited, just in
22 case, so I can add, remove them, do what I need to do to avoid
23 the audit -- oh, bonus. Jeff Green made a set of deal jackets
24 in the event that they asked them to be pulled. Because I am
25 the one they're going to call and tell what deals need to be

1 pulled. Mr. Broome said, well, there's no evidence that Mr.
2 Green brought those deal jackets back to her and she never saw
3 it.

4 Ladies and gentlemen, the evidence throughout this
5 case was that there was one person that Nissan contacted to
6 make sure those deals were pulled. She may have sent one of
7 her little people to go pull those deals, but the woman
8 responsible for having those jackets on hand the day the
9 auditor came on site was the defendant, Ms. Branch. And who
10 did it make sense for Mr. Green to bring those fake deal
11 jackets back to in the event that they got audited? The
12 defendant, Ms. Branch.

13 She didn't write back, I don't understand what you are
14 talking about when you are saying we only had 12 month --
15 whoa, this sounds terrible. Wait. I understand now. I am
16 out. You didn't see any of that. What you saw was an
17 attestation under penalty of perjury on August 1st, 2014.
18 Here is the Cullman deals. Here you go. You asked for those
19 15 deals, here is the Cullman ones. Nowhere friends, no
20 telling anybody other than Mr. Visser, oh, yeah, there were
21 these 15 Birmingham deal jackets that I think Jeff created.
22 Common sense. I can't even say that enough, ladies and
23 gentlemen.

24 The defendant was charged with 16 counts. The first
25 count is conspiracy, the agreement that they all had to do

1 what they were going to do. Let me be clear about something,
2 Mr. Broome would have you believe that Ms. Branch lived in a
3 little glass cake dome, a wonderful cake dome where everybody
4 around her understood that everything was wrong and everything
5 was fraud and making false documents is not right. She
6 doesn't do it in her personal life. But at work, she wasn't
7 quite sure if making false documents was okay. But everybody
8 around her somehow knew. Is that an honestly held belief? Is
9 that reasonable to think that an accountant truly did not know
10 what she was doing?

11 Knowingly and willfully she did every step of it. You
12 know what the tragic thing about this is that it was only for
13 \$1,286, and that they did all this for \$64,800. That's the
14 tragic thing. What's really sad is when good people have a
15 moment in their lives when they can either do the right thing
16 or they can do the wrong thing and they do the wrong thing to
17 make any amount of money.

18 We really appreciate your time and attention over the
19 last three days. And I would submit to you when you go back
20 and look at the evidence and the witnesses, the only
21 reasonable verdict that you will be able to find with your
22 common sense is guilty on all 16 counts. Thank you so much.

23 THE COURT: All right. The Court has a brief final
24 charge for the members of the jury. Tammi is going to hand
25 that to you now.

1 (Courtroom deputy is handing copies to the jury.)

2 (Final Instructions Before Deliberations.)

3 THE COURT: All right. You have now heard the
4 parties' closing arguments. There are a few final
5 instructions that I must give you. After I complete these
6 instructions, you will go to the jury room and begin your
7 discussions -- what we call deliberations after you have a
8 lunch break.

9 On the first day of trial, during the preliminary
10 instructions, I discussed note-taking. If you took notes,
11 those notes are to assist your memory only. They are not
12 entitled to greater weight than your memory or impression of
13 the testimony that you heard. Your own recollection and
14 interpretation of the evidence is what matters.

15 When you get to the jury room, choose one of your
16 members to act as foreperson. The foreperson will direct your
17 deliberations and will speak for you in court.

18 Each of you must decide the case for yourself, but
19 only after fully considering the evidence with the other
20 jurors. You must discuss the case with one another and try to
21 reach an agreement. While you discuss the case, do not
22 hesitate to reexamine your own opinion and change your mind if
23 you become convinced that you are wrong, but do not give up
24 your honest beliefs just because others think differently or
25 because you simply want to get the case over with.

1 Your verdict, whether guilty or not guilty, must be
2 unanimous as to each count -- in other words, you must all
3 agree. Your deliberations are secret, and you will not have
4 to explain your verdict to anyone.

5 Remember that in a very real way, you are judges --
6 judges of the facts. Your only interest is to seek the truth
7 from the evidence in the case.

8 A verdict form has been prepared for your convenience.
9 I was going to use the Elmo to show this to you, but since
10 we're having technical difficulties, I will just show you the
11 verdict form is going to have a section (pointing) for each of
12 the 16 counts in the indictment, and then it has a line that
13 says "guilty," and there's a blank, and a line that says, "not
14 guilty," and there's a blank. When you have a unanimous
15 decision as to each count, you will check the appropriate
16 blank. And then at the conclusion, the jury foreperson must
17 sign and date the verdict form.

18 Take the verdict form with you to the jury room,
19 please. When you have all agreed on the verdict, your
20 foreperson must fill in the form, sign it, date it, and carry
21 it. You will then notify Tammi that you have a verdict, and
22 you will return to the courtroom to deliver your verdict.

23 If you wish to communicate with me at any time, please
24 write down your message or question and give it to Tammi.
25 Tammi will bring it to me and I will respond as promptly as

1 possible -- either in writing or by talking to you in the
2 courtroom. But I caution you not to tell me how many jurors
3 have voted one way or the other at the time.

4 All right. Instead of retiring to the courtroom --
5 you need to retire to the jury room, and we do need to have a
6 lunch break first before you begin deliberating. There's one
7 other brief piece of business that I have to do with you.

8 When we have a criminal trial, the Court seats 14
9 jurors. Only 12 jurors are required to deliberate. The Court
10 seats 14 jurors in case anyone becomes sick, has to be missing
11 from trial, so that the Court can be sure that there will be
12 12 jurors to deliberate.

13 So, we have two alternate jurors: They are Mr. Chris
14 Williams and Mr. Brazelton. You all do not have to come back
15 after the lunch break, but you need to be available by your
16 cell phone, please. In case anything should happen during the
17 deliberations, there is the chance that we might have to call
18 you back. So I thank you two very much for your service.
19 Thank you for listening attentively to all the evidence in
20 this case, but you all are excused from deliberations.

21 Members of the jury, why don't you all please plan to
22 come back to the jury room for two o'clock. At that time,
23 please begin your deliberations. Until then, please do not
24 discuss the case with one another, please do not look up
25 anything on the internet. Just enjoy your lunch and be

1 prepared to come back to the jury room to begin deliberations.

2 All right? Thank you.

3 (Jury out at 12:51 p.m., until 2:00 p.m.)

4 THE COURT: All right. Is there anything from
5 either party right now that we need to put on the record?

6 MS. WICK: Not from the government, Your Honor.

7 MR. BROOME: Not for Ms. Branch, Your Honor.

8 THE COURT: I do have one more question for the
9 government with respect to the defendant's motion for
10 acquittal.

11 MS. WICK: Yes, Your Honor.

12 THE COURT: There is undisputed evidence that Ms.
13 Branch instructed the clerk when she had the deal jackets or
14 when the deals were -- the 15 deals were to be completed in
15 the accounting system, she did not instruct the clerks to
16 input those deals into the Reynolds and Reynolds system, the
17 Birmingham system. Instead, the undisputed evidence is that
18 she instructed the clerks to input that information into the
19 Cullman DMS system, the information she testified was capped
20 there. Help me understand what that means in terms of
21 fraudulent intent.

22 MS. WICK: Yes, Your Honor. So, when Mr. Visser
23 sent his instructions saying don't do the bills of sale, don't
24 do the title application --

25 THE COURT: In June. Which instructions are you

1 talking about?

2 MS. WICK: I am sorry, Government's Exhibit 40. The
3 fax. When he sent those to Cullman saying, don't do the bills
4 of sale, don't do the title application. It's very important
5 that these be booked in accounting. I believe Ms. Branch
6 testified that she said, Mr. Visser frequently misused that
7 term, and what she understood him to mean was that they be
8 finalized in accounting.

9 THE COURT: Right.

10 MS. WICK: Ms. Branch was the one who knew that that
11 couldn't happen -- that because of all the nightmares it would
12 create, they had to be finalized in Cullman. They had to be
13 capped in Cullman instead. But, if you are asking what the
14 intent to -- if you are asking was that part of her intent to
15 defraud, the government would argue that as the controller
16 part of her scheme was she actually made sure it got done
17 correctly in accounting and not what Mr. Visser said to do.

18 THE COURT: First of all, she didn't see Mr.
19 Visser's instructions. That's undisputed. Government's
20 Exhibit 40 is not something that Ms. Branch ever saw.

21 MS. WICK: She did claim that, yes, Your Honor.

22 THE COURT: It's undisputed. Did you put on any
23 evidence that says that she did see it?

24 MS. WICK: Other than the evidence that Mr. Housner
25 told her that he gave her instructions and -- if you are

1 asking -- no, nobody testified that she saw that piece of
2 paper, Your Honor.

3 THE COURT: So it's undisputed?

4 MS. WICK: Yes, Your Honor.

5 THE COURT: Okay. So there was never -- and Ms.
6 Branch also testified that no one gave her instructions about
7 how to input those 15 deals in the DMS; is that right?

8 MS. WICK: I believe it is, Your Honor.

9 THE COURT: Okay. So that's undisputed.

10 MS. WICK: Yes, Your Honor.

11 THE COURT: So if she wanted to carry out this
12 fraud, would she have put those deals into the Birmingham
13 system so that they matched what was put into the RDR? Or
14 would she put them into the Cullman system?

15 MS. WICK: She would the put them into the Cullman
16 system, Your Honor. At least two witnesses testified that
17 these are completely separate systems. The RDR's system and
18 the accounting system.

19 THE COURT: Understood.

20 MS. WICK: So what Mr. Green was testifying to in
21 terms of the problem with Government's Exhibit 40, with what
22 Mr. Visser instructed to do was that created a ton of work for
23 the accounting department in terms of what she would have had
24 to do. She had to book them in Cullman because of the way the
25 funds came from the lender for those cars.

1 THE COURT: No, let's think about what Mr. Visser
2 said in his e-mail in June of 2013. He said they had to be
3 booked in Reynolds and Reynolds. So if there was an audit,
4 the first stage of the audit is you get the information that
5 is taken out of the accounting system.

6 MS. WICK: Right.

7 THE COURT: For that information to match the RDR's,
8 because the 15 vehicles were RDR'd in Birmingham, you would
9 have to have the Birmingham accounting information, wouldn't
10 you?

11 MS. WICK: That's exactly right. That was her job.
12 Her e-mail says, I can manually add it or --

13 THE COURT: What did she do in March 2013?

14 MS. WICK: She had somebody cap the deals in
15 Cullman.

16 THE COURT: In Cullman.

17 MS. WICK: Yes, ma'am.

18 THE COURT: Right. What does that tell us about her
19 fraudulent intent?

20 MS. WICK: That she knew how to do it better than
21 Mr. Visser did.

22 THE COURT: Mr. Visser said they need to be inputted
23 into Reynolds and Reynolds so that if there is an audit --

24 MS. WICK: Right.

25 THE COURT: -- the accounting documents will match

1 the RDR.

2 MS. WICK: Right. So if Your Honor looks at
3 Government's Exhibit 24, page 2, his response to her says
4 "okay, just manually add them or remove them from the
5 information" because she was responsible for giving that
6 information to Nissan. So even if it was capped in Cullman,
7 she was responsible for putting that information in the report
8 that Nissan would get in an Excel spreadsheet that she could
9 just --

10 THE COURT: Ms. Wick, what is the date of Mr.
11 Visser's e-mail?

12 MS. WICK: June -- the response I believe is July --

13 THE COURT: No, I want to know the first one,
14 please.

15 MR. BROOME: June the 3rd -- 1st.

16 THE COURT: June 1st. Okay. If Nissan North
17 America had asked for an audit in April 2013, where would
18 those 15 deals have been reported in the accounting system?

19 MS. WICK: That audit was before.

20 THE COURT: I am not talking about that audit. I
21 am asking if Nissan had said, I want to audit these, we want
22 to audit these 15 deals, and they said that in April, 2013,
23 where would the deals be in DMS?

24 MS. WICK: In DMS, they were capped in Cullman.

25 THE COURT: Right.

1 MS. WICK: Yes.

2 THE COURT: Would that they be in Reynolds and
3 Reynolds?

4 MS. WICK: No, they would be in the Dealertrack.

5 THE COURT: No.

6 MS. WICK: Based on what Ms. Branch testified, she
7 would have capped them in Dealertrack in Cullman.

8 THE COURT: Right. Okay. So, in May of 2013, if
9 Nissan North America had said, we wanted to do an audit of
10 these 15 deals, where would the information in Serra's
11 accounting system be for those 15 deals?

12 MS. WICK: Her job was to add it to the Excel
13 spreadsheet, because Nissan didn't pull it, they asked for it.

14 THE COURT: I know, that's the point I am making.

15 MS. WICK: She would have had to manually add it to
16 the Birmingham spreadsheet before they gave it to Nissan.
17 That was her job. That's the government's --

18 THE COURT: That wasn't communicated to her until
19 June --

20 MS. WICK: The government -- I am sorry. I did not
21 mean interrupt you.

22 THE COURT: It's actually July. Mr. Broome, I
23 overheard you, but that's right, it's in the second e-mail
24 from Mr. Visser, that that is communicated for the first time
25 to Ms. Branch.

1 MS. WICK: Yes, Your Honor. And this is now the
2 government's fault, but one of the reasons why the other
3 exhibits of the audits were relevant was because they were
4 annual audits, and they had just finished an audit and had the
5 closing meeting on March 15th, 2013.

6 THE COURT: In which Ms. Branch was not present,
7 right?

8 MS. WICK: Yes.

9 THE COURT: She did not participate in the 2010
10 audit, did she?

11 MS. WICK: She actually did. She --

12 THE COURT: 2010. That's one of the audits you
13 wanted put in evidence, and the Court excluded it.

14 MS. WICK: Yeah --

15 THE COURT: Was she part of the 2011 audit if there
16 was one?

17 MS. WICK: No, Your Honor, that was before she
18 worked there.

19 THE COURT: Right. Was she part of the 2012 audit
20 to the --

21 MS. WICK: I think there was only ten, 11 and 13.

22 THE COURT: Okay. So the 2013 audit, Ms. Branch
23 participated in.

24 MS. WICK: Yes, Your Honor.

25 THE COURT: That did not include the 15 vehicles

1 we're talking about.

2 MS. WICK: That's right, Your Honor.

3 THE COURT: All right. Help me understand the
4 fraudulent intent, and what it means that when Ms. Branch put
5 the 15 deals into the DMS system, she put them into the
6 Cullman tracker system?

7 MS. WICK: That's right. Okay.

8 THE COURT: And remember, it's undisputed that no
9 one told her where to put the deals. So she believed they
10 were Cullman deals, and the Cullman clerk put those deals in
11 the Cullman tracker system.

12 MS. WICK: Your Honor, I am going to back up for a
13 second.

14 THE COURT: Okay

15 MS. WICK: I think that what Ms. Branch testified to
16 was that Forest Housner came to her in March '13 and said,
17 we're going to shift these 15 deals, you need to keep a list,
18 you need to bring the jacket to Jeff Green.

19 THE COURT: Right.

20 MS. WICK: Okay. She does that, and then
21 subsequently at some point those deals are capped in Cullman.

22 THE COURT: Yes.

23 MS. WICK: Okay. She knew, based on her accounting
24 experience, as Mr. Green testified, that if she actually
25 finalized those deals in Birmingham, there were going to be

1 all these extra accounting issues that were going to have to
2 be done. So it made absolute sense for her to cap those deals
3 in Cullman, because when they did the fraud on the Birmingham
4 side, they only had to put it in pending or book status just
5 to get the documents made, just to get the RDR -- that
6 information done, they did not have to finalize it. So it can
7 sit and never get finalized in Birmingham. She knew that she
8 could cap those deals in Cullman, and if there was an audit
9 later, when Nissan asked for the Excel spreadsheet, either for
10 Birmingham or Cullman, if they asked for Cullman, she would
11 just leave it and upload it. And if they asked for
12 Birmingham, she would manually add it to the Excel spreadsheet
13 that they would submit to Nissan.

14 THE COURT: If they asked for Cullman, they would
15 have 15 deals in Cullman that didn't have RDR's to match.
16 Right?

17 MS. WICK: One moment, Your Honor.

18 Your Honor, I just want to make sure I understand you.
19 You are asking specifically could they have unRDR'd the deals.

20 THE COURT: No, that's not what I am asking. You
21 just argued to me that Ms. Branch had figured out that she
22 only put the information about the deals in a Cullman tracker
23 system, and that way if Nissan wanted to audit Cullman and
24 they asked for information, they would get the tracker
25 information. If Nissan wanted to audit Birmingham, then Ms.

1 Branch would have to go in and make a manual adjustment in the
2 paperwork because she hadn't put the deals -- she hadn't
3 finalized the deals in Reynolds and Reynolds.

4 And my question to you is if Nissan North America had
5 said, we want to audit Serra Visser Nissan, the Cullman store,
6 they would have found 15 deals in the Serra Visser accounting
7 for which they had no RDR's because the cars were RDR'd in
8 Birmingham, so that would immediately flagged to Nissan North
9 America that something didn't match.

10 MS. WICK: No, Your Honor, I think the problem is
11 this -- if Nissan were to do an audit of Birmingham, because
12 that's where they RDR'd the cars, they would have 15 RDR's.
13 Right?

14 THE COURT: Right.

15 MS. WICK: They would have the -- and if they came
16 -- let's start with step one. They would have the 15 RDR's.
17 They reconciled -- they asked Ms. Branch to send the
18 accounting information. She capped them in Cullman, but she
19 could easily just type into the Excel spreadsheet, she could
20 manually, literally manually type them into the accounting
21 information in the Excel spreadsheet that she would then send
22 to Nissan to say, here are these 15 deals, here is the
23 information in accounting, so now the 15 RDR's match the 15 in
24 accounting, and then they had the 15 deal jackets if they
25 showed up on site. But they didn't RDR these deals in

1 Cullman. She never had to have RDR information to match in
2 Cullman, because they wouldn't have popped up in Nissan's RDR
3 system for an audit. So if they audited Cullman, there
4 weren't 15 RDR's for them to audit. Is that even remotely
5 close to what you are asking?

6 THE COURT: That does answer the question about your
7 statement that if there was an audit of Cullman, that she
8 would already have put the documents in the accounting system
9 in Cullman.

10 MS. WICK: Yes, I don't believe there's any dispute
11 that she capped -- or excuse me. That either she or somebody
12 in her office capped those 15 deals in Cullman. That's how it
13 had to be done because of the finances with the lender. I
14 don't believe that's in dispute. But that doesn't change her
15 ability then if Nissan audited Birmingham to manually add that
16 information to the Excel spreadsheet that she sends to Nissan
17 and says, here is our accounting data, because she had the
18 ability to manually add that information to the Excel
19 spreadsheet.

20 THE COURT: Okay. I understand your argument.

21 MS. WICK: I am sorry it took me so long to get
22 there.

23 THE COURT: No, just following through. Okay.
24 Thank you.

25 MR. BROOME: Judge, could I briefly respond?

1 THE COURT: Oh, please.

2 MR. BROOME: Judge, the government keeps talking
3 about if, if, if we did this, but we never did that. They're
4 talking about some wire fraud that I did on or about March of
5 2013, and then they're speculating about what might have been
6 done down the road if there was an audit. I think that's a
7 distinction.

8 THE COURT: Okay. All right. Got it. Thanks.

9 (Recess taken at 1:08 p.m.)

10 (Jury deliberations began at 2:00 p.m.)

11 (Out of the presence of the jury at 3:09 p.m.)

12 THE COURT: I hate to bring you all in for this, but
13 it's a quick procedural question from the jury, but I want to
14 make sure we have everything on the record.

15 We have a question from the jury: Do we have a copy
16 of the indictment; we cannot find it?

17 We did not give the jury a copy of the indictment when
18 we gave them the exhibits. So, we have Document One, the
19 indictment. We're using the unsigned copy of the indictment.

20 MS. MURNAHAN: Your Honor, is the forfeiture
21 provision removed from that?

22 THE COURT: Oh, you know -- good question. It is
23 not. Thank you for bringing that to the Court's attention.

24 So we are removing pages 9 and 10 from Document One
25 and giving the jury pages 1 through 8. Any objections?

1 MS. WICK: Not from the government, Your Honor.

2 MR. BROOME: No, Your Honor.

3 THE COURT: Thank you.

4 (Continued jury deliberation.)

5 (Out of the presence of the jury at 5:36 p.m.)

6 THE COURT: My plan is to call the jury. Yesterday
7 Ms. Morgan mentioned when we were talking about whether to
8 keep going, that it takes her almost an hour to commute back
9 and forth to the courthouse, and I don't want anyone in the
10 jury to feel like they're being pressured to stay to keep
11 working when they, in the back of their minds, they may be
12 concerned about driving back and forth. So, unless anybody
13 has an objection, I would like to offer them the alternative
14 for retiring for now and coming back tomorrow.

15 MS. WICK: No objection from the government, Your
16 Honor.

17 MR. BROOME: None from Ms. Branch, Your Honor.

18 THE COURT: All right.

19 (Jury in at 5:38 p.m.)

20 THE COURT: The Court wanted to check with the
21 members of the jury to see how you feel about timing. It is a
22 little after 5:30.

23 Ms. Morgan, I know yesterday when we were talking
24 about when to leave, you mentioned that you have an hour
25 commute back and forth to the courthouse. So, I wanted to see

1 how you all feel. Would you like to retire for the evening
2 and come back in the morning to deliberate some more, or do
3 you feel like you want to continue working right now? We're
4 not in a rush to leave if you all want to continue working,
5 that's fine, but if it's an inconvenience for you now, we're
6 going to be here tomorrow, too. So, it's up to you all.

7 JUROR BALAZS: Can we have a minute?

8 THE COURT: Do you want to go back into the jury
9 room and talk a minute?

10 JUROR MORGAN: Could we huddle?

11 THE COURT: Sure.

12 (Jury conferring with one another.)

13 JUROR MONTGOLF: We have a person that has a
14 mandatory meeting tomorrow. Do we need to call in an
15 alternate?

16 THE COURT: What do the parties say about that?

17 MS. WICK: Your Honor, if the jurors want to return
18 tomorrow and one of the jurors has a conflict, I would hate
19 for them to miss out, if they want to call in an alternate. I
20 know that might extend things, but whatever the Court feels is
21 best, frankly, and whatever is best for the jury.

22 MR. BROOME: That's pretty much Ms. Branch's
23 feelings, too, Your Honor. I would hate to inconvenience the
24 lady.

25 THE COURT: And the alternative -- is there any way

1 -- Ms. Balazs, is it you -- Ms. Montgolf, do you have the
2 meeting?

3 JUROR MONTGOLF: No, it's her.

4 THE COURT: So Ms. Manning, you have the meeting.
5 Is there any way you could go to the meeting and leave by
6 2:00?

7 JUROR MANNING: Yes.

8 THE COURT: Is there any way that you could go to
9 the meeting for a while and that you all could resume
10 deliberating after lunch? Do you think if you explain the
11 circumstance at work that they would help divide the
12 responsibilities so that you could come back, and I could ask
13 the jury to come back after lunch? Because you've been
14 working hard already.

15 JUROR MANNING: I really don't know how it works
16 because it is a home-school meeting. Then I have to take the
17 kids to the meeting. I mean, we got to get the books and all
18 of that.

19 THE COURT: Okay. I tell you what, I hate to ask
20 this, but would you all mind stepping back in the jury room
21 for a minute and let me talk to counsel.

22 (Jury out 5:43 p.m.)

23 THE COURT: All right. I guess the Court, we all
24 have two options here; two that I have thought of. You all
25 may have other suggestions and I welcome your suggestions.

1 One would be to take tomorrow off and ask the jurors to come
2 back on Monday to deliberate so that we can continue the
3 deliberations with the 12 jurors who are here. I don't know
4 what other inconveniences that may create by not finishing the
5 deliberations tomorrow. Of course, there is no assurance that
6 if we bring in a new juror, bring in one of the alternates,
7 that we will have a verdict by the end of the day tomorrow.

8 So, I would like to hear from you all and again hear
9 other suggestions that you may have. I didn't ask how close
10 they are.

11 MS. WICK: That was the only thing I was probably
12 going to ask, Your Honor. But go ahead, Mr. Broome.

13 MR. BROOME: Judge, the only potential problem next
14 week is I have another trial week in Calhoun County, and I am
15 usually the entertainment. I have been told that I am second.

16 THE COURT: And your son hasn't passed the bar yet?

17 MR. BROOME: No, Your Honor. And again, thank you,
18 Your Honor, for allowing him.

19 THE COURT: What is your name?

20 WILL BROOME: I am Will.

21 MR. BROOME: He is a Junior, but we don't call him
22 that. I am second.

23 So I don't -- the case may resolve. I was hoping to
24 go back to the jail tonight and talk to a client in the jail.
25 During the break, I talked to the district attorney's office

1 and they may made me an offer that my client should not refuse
2 on that case. It doesn't always mean you take it, but...

3 THE COURT: Right. Ms. Wick.

4 MS. WICK: Your Honor, I started to say earlier you
5 didn't ask them how close they are. That information might be
6 helpful, and maybe if we know the answer to that, it may
7 resolve things. If not, Mr. Broome and I can talk to see --

8 THE COURT: Ms. Coe, do you mind asking the jurors,
9 please?

10 Ms. Wick, do I remember correctly, too, that you will
11 be in St. Louis next week?

12 MS. WICK: I'll be here at least through Wednesday,
13 Your Honor.

14 THE COURT: Okay.
15 (Brief pause.)

16 THE COURT: Ms. Coe, what did the panel members of
17 the jury tell you about timing?

18 THE COURTROOM DEPUTY: They said they're not even
19 close to a decision at this point.

20 MS. WICK: Your Honor, my co-counsel made a really
21 good point. She said they've had it for three hours, maybe
22 bringing in the alternate might actually be the best solution.
23 I would also hate for that juror to miss this mandatory home
24 meeting. That sounds very important to her. But at the same
25 time, I will be here next week. So if the Court wants to, you

1 know, break and bring them in Monday, I think either way is
2 probably fine with the government.

3 THE COURT: Just so you all will know, we have a bit
4 of a logistical challenge, too, because our jury clerk is out
5 today, and so we're not sure whether we can get the cell phone
6 number for the alternate juror tonight. And if we can't, we
7 would have to start working in the morning on trying to get in
8 touch with the alternate to have the alternate come in. So
9 that could happen quickly or not. I just don't know.

10 MS. WICK: Well, Your Honor, I apologize. We raced
11 over here. We did not bring any of the lists of the jurors.
12 So I am not actually sure who the next alternate would be.

13 MR. BROOME: I think we can help you with that one.
14 It doesn't matter if you look at my notes because it's over.

15 MS. WICK: Was Mr. Williams the young man that was
16 in the front left corner here?

17 THE COURT: Yes, ma'am. I believe.

18 MS. WICK: My memory is he is friends with Mr.
19 Gabriel Evans, and he probably has -- he may have the
20 gentleman's phone number.

21 THE COURT: He may.

22 MS. WICK: I just wasn't sure if it was the right
23 guy.

24 THE COURT: He is friends with the other Mr.
25 Williams; is that correct?

1 MR. BROOME: They went to Troy.

2 THE COURT: Oh, Mr. Evans then. Okay.

3 MS. WICK: That's the only suggestion that I can
4 make.

5 THE COURT: That might work

6 MR. BROOME: Your Honor --

7 THE COURT: That's what I had down. I think that is
8 right.

9 MR. BROOME: Judge, I can probably, if the Court
10 might just give me a note to be absent from state court, I am
11 fine with tomorrow, but I think I can probably work something
12 out.

13 THE COURT: Are you stating a preference for what
14 you would like?

15 MR. BROOME: No, not really Your Honor, if they can
16 do it tomorrow.

17 MS. WICK: I guess at this point, the government's
18 presence would probably just -- if there's a chance to reach
19 the alternate, that would probably be the best thing.

20 MR. BROOME: I guess the other thing would be --
21 never had this situation in 38 years. Does the alternate
22 brought in on the deliberations or are they to go back and
23 kind of start over?

24 THE COURT: I will instruct them to go back and
25 start over. It can't be a unanimous decision unless he has

1 been part of the discussions throughout.

2 MS. WICK: So we would have lost three hours of
3 deliberations. But if we wait until Monday, we'll lose eight
4 tomorrow, possibly. So it's in some ways it's...

5 THE COURT: Well, again, I can ask Tammi to go ask
6 the jurors if there would be any problem if we take off and
7 resume on Monday. That's not altogether unusual.

8 MR. BROOME: I do have one question, Your Honor, and
9 I may be wrong. I thought Your Honor was going to Huntsville
10 next week or...

11 THE COURT: As of right now, I am not.

12 MR. BROOME: Oh, okay. I'm sorry.

13 THE COURT: Something came up in that case -- I did,
14 and that case has been continued for the time being. So I am
15 actually around. I don't know what Monday looks like, but I
16 know I am here.

17 MS. WICK: Your Honor, if the government -- if the
18 government had to give a preference, it would probably be to
19 just call the alternate. If the Court wants to wait until
20 Monday, that's understandable, too.

21 THE COURT: Okay. And if you all want, I can ask
22 the jurors if they have a preference because it might help
23 make the decision if some of them express concern about
24 waiting until Monday.

25 MS. WICK: That would be great, Your Honor, because,

1 theoretically, if they thought that they were say five hours
2 away, they could theoretically get that done tomorrow and not
3 want to have to deal with this over the weekend. So maybe
4 asking the jurors may be really helpful.

5 THE COURT: Mr. Broome, this is very important to
6 your client. So, let me hear from you.

7 MR. BROOME: Judge, I guess our presence would also
8 be to call in the alternate and start over tomorrow.

9 THE COURT: Okay. All right. Tammi, will you bring
10 in the jury, please.

11 THE COURTROOM DEPUTY: Yes, ma'am.

12 MR. BROOME: I guess one consideration would be if,
13 one, this gentleman has the alternate's phone number, and I
14 don't know how you would go about asking that except just to
15 ask.

16 THE COURT: Is it all right with counsel if I ask
17 Mr. Evans if he would by any chance have that number? If we
18 can't reach the court clerk, if he is willing to share his
19 cell phone number with Tammi, Tammi can call him and see if we
20 can connect with Mr. Williams?

21 (Jury in at 5:56 p.m.)

22 THE COURT: This is an unusual situation. It
23 doesn't arise all that often. The parties have discussed the
24 situation, and I have discussed different options with them.
25 We have decided to go ahead and allow Ms. Manning to attend

1 her meeting tomorrow and call one of the alternate jurors in.
2 I don't want this to come as a surprise to you. Number one,
3 we have to reach him. So that means that I am going to need
4 to ask you all to come back tomorrow morning. But I am not
5 sure when we will be able to reach him to have him here.

6 Number two, when we do reach him and he gets here, the
7 Court is going to instruct you all that you have to begin your
8 deliberations over again, because that juror will have to be
9 part of the totality of the conversations. Okay? So, that's
10 how we plan to proceed.

11 The alternate juror is Mr. Williams. We are going to
12 work on getting his cell phone number from our court clerk who
13 took care of helping to organize you all when you came in on
14 Monday. Mr. Evans, do you know Mr. Williams?

15 JUROR EVANS: Yeah, I do. I don't have his number.
16 He has my number.

17 THE COURT: We were wondering if you might be an
18 alternative source of a telephone number?

19 JUROR EVANS: I can still reach him, though, but
20 like social media, or something like that.

21 THE COURT: All right. Well, let us see if we can
22 reach him by cell phone. But if you are willing to share your
23 cell phone number with Tammi, if we can't do that, if you have
24 a way of reaching out to him, is that okay with everyone?

25 MS. WICK: We would greatly appreciate it. Thank

1 you.

2 MR. BROOME: That's fine, Your Honor.

3 THE COURT: Because we don't know exactly when we'll
4 be able to get in touch with Mr. Williams, how about if you
5 all plan to get started at 10:00 tomorrow morning. That gives
6 us a little bit of time to be working in the morning to try to
7 reach Mr. Williams if we can't find him tonight.

8 I suppose, another alternative that I can discuss with
9 counsel, if we get to this bridge, we could talk about calling
10 in the other alternate if we can't reach Mr. Williams.

11 We know what our options are. I appreciate your
12 patience while we try to work through this this evening, and
13 we will look forward to seeing you all tomorrow.

14 Ms. Manning, thank you very much for your service. If
15 you will, just to be on the safe side, please leave your cell
16 phone number with Tammi, that would be helpful. Okay?

17 Everybody have a nice evening and drive home safely.
18 And please remember, even though you have begun deliberating,
19 you can't talk about the case outside of your deliberations.
20 All right? Thank you.

21 (Jurors out at 5:59 p.m.)

22 THE COURT: Any objections from any party as to how
23 the Court handled that?

24 MS. WICK: Not at all, Your Honor.

25 MR. BROOME: None for Ms. Branch, Your Honor.

1 THE COURT: You all have a good evening. See you in
2 the morning.

3 (Proceedings concluded at 6:00 p.m.)
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